SUPREME COURT, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-306

PASSAIC VALLEY WATER COMMISSION, a public body of the State of New Jersey, for itself and on behalf of the CITIES OF PATERSON, PASSAIC, AND CLIFTON in the State of New Jersey,

Petitioner,

vs.

STATE OF NEW JERSEY, *Ex Rel* DEPARTMENT OF HEALTH, NORTH JERSEY DISTRICT WATER SUPPLY COMMISSION and CITY OF NEWARK in the State of New Jersey,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

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IN THE

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No.

PASSAIC VALLEY WATER COMMISSION, a public body of the State of New Jersey, for itself and on behalf of the CITIES OF PATERSON, PASSAIC, AND CLIFTON in the State of New Jersey,

Petitioner,

vs.

STATE OF NEW JERSEY, *Ex Rel* DEPARTMENT OF HEALTH, NORTH JERSEY DISTRICT WATER SUPPLY COMMISSION and CITY OF NEWARK in the State of New Jersey,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

Passaic Valley Water Commission (Passaic Valley) a public body of the State of New Jersey, for itself and on behalf of the Cities of Paterson, Passaic, and Clifton in the State of New Jersey, your Petitioner, prays that a Writ of Certiorari issue to review the Order of the Supreme Court of New Jersey, entered in this cause on July 22, 1974, reconsideration denied September 9, 1974.

Opinions Below

The Order of the Supreme Court of New Jersey denying a Petition for Certification to the Superior Court of New Jersey, Appellate Division, was entered herein without opinion on July 22, 1974. It has not yet been officially reported and is reprinted at p. 19a of the Appendix hereto.

The Order of the Supreme Court of New Jersey granting a stay of the judgment of the Superior Court of New Jersey, Appellate Division, was filed on August 5, 1974, and is reprinted at p. 21a of the Appendix hereto.

The Supplemental Order modifying stay of the judgment of the Superior Court of New Jersey, Appellate Division, was filed on August 28, 1974, and is reprinted at p. 24a of the Appendix hereto.

The Order of the Supreme Court of New Jersey continuing the stay as modified and denying reconsideration of Petition for Certification was entered herein without opinion on September 9, 1974. It has not yet been officially reported and is reprinted at p. 26a of the Appendix hereto.

The Opinion of the Superior Court of New Jersey, Appellate Division, by the Honorable Alan B. Handler, J.A.D. entered herein on March 8, 1974, is reported at 127 N. J. Super. 251, 317 A. 2d 86 (App. Div. 1974). It is reprinted at pp. 1a to 18a of the Appendix hereto.

The Oral Opinion of the Superior Court of New Jersey, Chancery Division, by the Honorable Theodore W. Trautwein, J.S.C., entered herein on July 26, 1972, is not reported, and is reprinted at pp. 28a to 43a, of the Appendix hereto.

The letter opinion and corrections of the Superior Court of New Jersey, Chancery Division, by the Honorable Theodore W. Trautwein, J.S.C., entered herein on October 7, 1971, are not reported and are reprinted at pp. 44a to 56a of the Appendix hereto.

Pertinent post trial correspondence is also reprinted:

Letter dated May 15, 1972, from Newton M. Roemer to Hon. Theodore W. Trautwein, at p. 57a of the Appendix hereto.

Letter dated May 16, 1972, from Newton M. Roemer to Hon. Theodore W. Trautwein at p. 70a of the Appendix hereto

Letter dated June 1, 1972 from Newton M. Roemer to Hon. Theodore W. Trautwein at p. 76a of the Appendix hereto.

Letter dated August 7, 1972, from Newton M. Roemer to Hon. Theodore W. Trautwein at p. 78a of the Appendix hereto.

Jurisdiction

1. The Superior Court of New Jersey, Appellate Division, rendered its decision on March 8, 1974. Thereafter, the Supreme Court of New Jersey denied certification on July 22, 1974; entered an Order granting a stay pending filing of a Petition for Certiorari on August 5, 1974; entered a Supplemental Order modifying the aforesaid stay on August 28, 1974; and, on September 9, 1974, entered an Order continuing the modified stay and denying application for reconsideration of the Petition for Certification.

No application for further rehearing or for an extension of time within which to petition for Certiorari has

been applied for, granted, or denied, and the judgments and orders for which Certiorari is requested are final by their terms.

2. The Federal questions were raised in the Answer filed in the Superior Court of New Jersey, Chancery Division, reprinted below at pp. 80a to 88a of the Appendix hereto.

3. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

Questions Presented

1. Where Petitioner has been ordered by the State of New Jersey to shut down its existing and functioning filter plant and is ordered to assume a major part of the cost of contructing a new plant which the State desires in order to provide filtered water to others outside the Petitioner's service area, does not such action constitute a denial of equal protection and a taking of property without due process, in violation of the Constitution of the United States and the Constitution of the State of New Jersey?

2. Where the language of a statute restricts a State agency's power to issue bonds to projects where "water [is] made available by the State" and where the legislative history of that statute shows that such limited bonding power was not to apply to other projects, does not the authorization of bonding under circumstances which ignore the restrictions constitute a denial of equal protection and a taking of property without due process in violation of the Constitution of the United States and the Constitution of the State of New Jersey?

3. Where an agency of the State invokes the State's police power to require citizens of three municipalities

to provide funds so that a filter plant may be constructed for citizens outside those three municipalities, does not such action constitute a denial of equal protection and a taking of property without due process in violation of the Constitution of the United States and the Constitution of the State of New Jersey?

4. Under circumstances characteristic of inverse condemnation, is it not a denial of equal protection and a taking of property without due process in violation of the Constitution of the United States and the Constitution of the State of New Jersey to reject consideration of the income capitalization approach to the computation of damages?

Constitutional Provisions and Statutes Involved

Constitution of the United States, Amendment V:

> "[No person shall] . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Constitution of the United States, Amendment XIV:

> "[No State shall] . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Constitution of the State of New Jersey, Article 1, ¶20:

> "Private property shall not be taken for public use without just compensation. Individuals or private corporations shall not be authorized to take private property for public use without just compensation first made to the owners."

Constitution of the State of New Jersey, Article 4, §6, ¶3:

> "Any agency or political subdivision of the State or any agency of a political subdivision thereof, which may be empowered to take or otherwise acquire private property for any public highway, parkway, airport, place, improvement, or use, may be authorized by law to take or otherwise acquire a fee simple absolute or any lesser interest, and may be authorized by law to take or otherwise acquire a fee simple absolute in, easements upon, or the benefit of restrictions upon, abutting property to preserve and protect the public highway, parkway, airport, place, improvement, or use; but such taking shall be with just compensation."

N.J.S.A. 58:5-34(16):

> [Definitions]
>
> "* * *
>
> (16) 'Water transmission facility' or 'transmission facility' means any real property and rights therein, and any plants, structures, machinery and equipment and other property real, personal and mixed, acquired, constructed or operated, or to be acquired, constructed or operated *for or in connection with* the treatment, filtration, transmission or distribution by a commission of *water made available by the State*, including without limiting the generality of the foregoing, standpipes and other storage facilities, pumping stations, treatment plants, filtration plants, conduits, transmission mains, aqueducts, pipelines, mains, canals, open waterways and channels, connections and interconnections, roads and other plants, structures, machinery, tools, equipment, boats, conveyances, and

other real and personal property, and rights therein, and any and all appurtenances necessary, useful, convenient or incidental to or in connection with the acquisition, construction, operation or maintenance of any of the foregoing; * * *." (Emphasis supplied)

N.J.S.A. 58:5-36(a):

"A Commission shall have the power . . .

(a) to own, maintain, repair, reconstruct, operate and use water transmission facilities and, to that end, to acquire, by purchase, gift, condemnation or otherwise, and, to construct, maintain, repair, reconstruct, operate and use all plants, structures, equipment and other real and personal property, deemed necessary for, or incident to, any such facilities; and for said purposes may enter into any contracts or agreements, execute all instruments, and do all things necessary or convenient to carry out any power given in this act; *provided, however, that a commission shall not have the power to condemn any waterworks, reservoir, transmission facility, water supply system, pipeline or any appurtenances thereto owned by a municipality or by a municipal or intermunicipal authority or commission;* * * *" (Emphasis supplied)

State of the Case

This is a Petition for a Writ of Certiorari to review a decision rendered by the Superior Court of New Jersey, Appellate Division, affirming the judgment of the Superior Court of New Jersey, Chancery Division.

The history of this case may be found in *Newark* v. *Dept. of Health of N. J.*, 109 N. J. Super. 166, 262 A. 2d 718 (App. Div. 1970).

We shall not repeat that material but respectfully request that it be considered as part of this Petition. In essence, this case raises substantial constitutional questions which resulted from the State's notice to North Jersey District Water Supply Commission (North Jersey) to improve the quality of the water which it distributes. It should be observed that this notice was not addressed to Passaic Valley, which later became involved in this litigation through a third party complaint filed by North Jersey in which it acknowledged that it did not have the ability to provide the facilities required by the State without the financial support of Passaic Valley and the other partners in the Wanaque-Ramapo System. Somewhere in the course of this litigation, North Jersey changed its position and now claims that it has the power to issue its own bonds. The record in this case is replete with admissions that the State wants a filter plant built at Wanaque as part of statewide policy. Water resources management in New Jersey is in a far from stabilized condition. Not only finances, but considerations of water technology and environmental protection are also implicated. No one can predict with any degree of certainty what financial support will be available at State or Federal levels. Against this background, the injustice of requiring Passaic Valley to wipe out its functioning filter plant so that citizens beyond its service area may be provided with the benefits of facilities not paid for by them is both confiscatory and wasteful and clearly violates substantial constitutional rights. However laudable the goals may be, the means cannot be justified even under the most expansive interpretation of the State's police power.

We have attempted in our various Briefs and Pleadings filed below to indicate in a general way that highly significant material is now being developed at the highest levels of State government, which have a strong likeli-

hood of influencing the future management of the State's water resources. More and more it appears that the State will take over important water projects so that citizens throughout the State may receive their fair share of the State's resources and also bear their fair share of their costs. Typical of the movement in the direction of this philosophy is *Robinson* v. *Cahill*, 62 N. J. 473, 63 N. J. 196, 303 A. 2d 273 (1973). It is a short and simple process to cite the rational of *Robinson* v. *Cahill*, supra, to justify the proposition that each municipality should be required to pay the cost of the benefits which it will receive, and Petitioner should not be saddled with extra-territorial fiscal burdens. This is the root from which spring the constitutional infirmities of equal protection, due process, and just compensation. It is respectfully submitted that these significant issues require this Court's review.

Reasons for Granting the Writ

1. By its action, the Superior Court of New Jersey, Appellate Division, has decided an important question of constitutional law which transcends the immediate parties and affects every municipality thoughout this nation in terms of its relationship to the State within which it may be located and the manner in which that State invokes its police power. In this case, a State agency, the State Department of Health (now the Department of Environmental Protection) promulgated an order on another State agency (North Jersey) which was intended to accommodate statewide water planning, but which imposed the financial burden upon Petitioner and the three cities for whom it is operating agent, thereby denying equal protection and resulting in a taking of property without due process of law. *Delaware, Lackawanna & Western*

R. Co v. *Morristown*, 276 U. S. 182, 48 S. Ct. 276, 56 A. L. R. 756, 72 L. Ed. 523 (1928); *Missouri P. R. Co.* v. *Nebraska ex rel. Board of Transportation*, 164 U. S. 403 17 S. Ct. 130, 41 L. Ed. 489 (1896); *Osborn* v. *Nicholson*, 13 Wall. 654, 20 L. Ed. 689 (1872).

2. The statutory basis on which North Jersey rests its claim to power does not confer upon it the right to condemn petitioner's filter plant, nor to issue bonds for the construction of a new plant. Notwithstanding, North Jersey is corrupting the use of the State's police power to accomplish indirectly what the clear language of the statute expressly prohibits. This action violates Federal and State constitutional provisions and constitutes a denial of equal protection and a taking of property without due process. *Chicago, B. & Q. R. Co.* v. *Chicago*, 166 U. S. 226, 17 S. Ct. 581, 41 L. Ed. 979 (1897); *Franklin County Water District* v. *Majors*, 476 S. W. 2d 371 (Ct. Civ. App. Tex. 1972); *City of Arlington* v. *Bardin*, 478 S. W. 2d 182, 189 (Ct. Civ. App. Tex. 1972).

3. The action below requiring Petitioner to use its funds for extraterritorial state purposes and to abandon its functioning filter plant constitutes a denial of equal protection and the taking of property without due process. *Shirk* v. *City of Lancaster*, 313 Pa. 158, 169 A. 557, 560 (Sup. Ct. Pa. 1933); *Board of Commissioners of Tippecanoe County* v. *Lucas*, 93 U. S. 108, 23 L. Ed. 822 (1876).

4. By invoking the State's police power, the action of North Jersey in requiring Petitioner to wipe out its functioning filter plant constitutes inverse condemnation. This being so, the action below which disallowed damages based on the income capitalization approach, constitutes a denial of equal protection and the taking of property without due process. *Goldblatt* v. *Hempstead*, 369 U. S.

590, 82 S. Ct. 987, 8 L. Ed. 2d 130 (1962); *Berman* v. *Parker*, 348 U. S. 26, 75 S. Ct. 98, 99 L. Ed. 27 (1954); *Mineral Park Land Co.* v. *Howard et al.*, 172 Cal. 289, 156 P. 458, L. R. A. 1916 1 (Sup. Ct. 1916).

CONCLUSION

For the foregoing reasons, Petitioner prays that its Petition for a Writ of Certiorari to the Superior Court of New Jersey, Appellate Division, be granted.

Respectfully submitted,

NEWTON M. ROEMER
Attorney for Petitioner

[APPENDICES FOLLOW]

APPENDIX A

Opinion of the Superior Court of New Jersey, Appellate Division

(Filed—March 8, 1974)

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

A-191-72
A-273-72

STATE OF NEW JERSEY, *ex rel.*, DEPARTMENT OF HEALTH,

Plaintiff-Respondent,

v.

NORTH JERSEY DISTRICT WATER SUPPLY COMMISSION,

Defendant and Third Party Plaintiff-Respondent,

v.

CITY OF NEWARK and PASSAIC VALLEY WATER COMMISSION,

Third Party Defendants-Appellants,

and

TOWN OF KEARNY, BOROUGH OF GLEN RIDGE, TOWN OF MONTCLAIR, TOWN OF BLOOMFIELD, CITY OF PASSAIC, CITY OF PATERSON, CITY OF CLIFTON,

Third Party Defendants.

Appendix A

Argued October 1, 1973—Decided Mar 8-'74

Before Judges CONFORD, HANDLER and MEANOR.

On appeal from the Superior Court of New Jersey, Chancery Division, Passaic County.

Mr. Donald Coburn, Assistant Corporation Counsel, argued the cause for the Third Party Defendant-Appellant City of Newark. (*Mr. William Rossmore,* Assistant Corporation Counsel, on the brief; *Mr. William H. Walls, Corporation Counsel,* Attorney).

Mr. Newton M. Roemer argued the cause for the Third Party Defendant-Appellant Passaic Valley Water Commission.

Mr. Albert S. Gross argued the cause for the Defendant and Third Party Plaintiff-Respondent North Jersey District Water Supply Commission.

Mr. Joseph M. Clayton Jr., Deputy Attorney General argued the cause for the Plaintiff-Respondent State of New Jersey, ex rel., Department of Health (Mr. George F. Kugler, Jr., Attorney General of New Jersey, Attorney).

The opinion of the court was delivered by
HANDLER, J.A.D.

This is the sequel to *Newark* v. *N. J. Dept. of Health,* 109 N. J. Super. 166 (App. Div. 1970). As directed therein, the court below held a plenary hearing encompassing various issues raised by appellants' attack upon the order of the State Department of Health (Department) promulgated on January 24, 1966, as well as the implementation thereof as proposed by the North Jersey District Water Supply Commission (Commission or North Jersey). This

plan was approved by the Department and concurred in by all of the participating municipalities with the exception of appellants, City of Newark (Newark) and Passaic Valley Water Commission (Passaic Valley).

The court below determined upon cross motions for partial summary judgment that the participating members were required to contribute to the cost and operation of the proposed filtration plant required by the Department. It also delineated as the remaining questions to be resolved by a hearing: the reasonableness of the proposed filtration plant with respect to its capitalization requirements and the method of payment therefor, computation of the respective contributions of the constituent municipalities, and compensation, if any, to Passaic Valley for damage to or loss of its filtration facilities at Little Falls. Following a full plenary hearing, the trial court entered a judgment which provided:

> A. North Jersey District Water Supply Commission is ordered and directed with all possible speed to finance, construct and operate a chemical filtration plant facility in a suitable area at the Wanaque Reservoir Headworks, Wanaque, New Jersey, to serve Newark, Clifton, Paterson, Passaic, Bloomfield, Glen Ridge, Kearny and Montclair, in compliance with the mandate of the State of New Jersey, Department of Health.
>
> B. The cost of financing, constructing and operating said filtration facility be borne and paid for by said constituent members in proportion to their percentage of ownership.
>
> C. The North Jersey District Water Supply Commission shall be and is hereby authorized and

directed forthwith pursuant to the provisions of N.J.S.A. 58:5-1 *et seq.* for the purpose of financing, constructing and operating said filtration facility to issue and market its bonds secured by a pledge or lien on its revenues.

D. The North Jersey District Water Supply Commission shall pay to the Passaic Valley Water Commission $650,160.00 the present fair value of its Totowa Pressure Filtration Plant, as soon as feasible out of the proceeds of the bond issue aforesaid.

To sharpen the focus on this appeal, the essential issues to be resolved may be characterized as follows: (1) whether the determination that there should be a new filtration plant located at the Wanaque headworks was reasonable, in light of the effect thereof upon the interests of Passaic Valley and Newark; (2) whether Passaic Valley and Newark may be compelled to participate in the proposed filtration plant at Wanaque and to contribute a proportionate share of the costs of constructing that facility; (3) whether the award of damages for the loss sustained by Passaic Valley attributable to the anticipated abandonment of its pressure filtration plant at Little Falls was improper or inadequate; and (4) whether the directive that North Jersey could finance the proposed filtration plant through the issuance of its own bonds secured by a pledge or lien on its revenues was improper or invalid.

I.

Appellants have taken the position that the proposed filtration facility at the Wanaque headworks "is economi-

cally unfeasible and will be disastrous to the owner-municipalities comprising Passaic Valley and to Newark." This contention is supplemented by the further assertion that Passaic Valley "could readily improve its present facilities to meet and surpass all state standards" and that Newark could build an "entirely satisfactory" facility in Belleville and should, at the very least, have been given the opportunity "to explore this feasible approach * * *."

The trial court noted that the only comprehensive study that was undertaken in response to the Department's order of January 24, 1966, was that submitted by the consulting engineers on January 12, 1968, and accepted by the Department on February 1, 1968. The recommendation as approved by the Department was for a new filtration plant at Wanaque. The court felt compelled, "by the overwhelming evidence" reflected in the engineers' reports to approve their recommendations and adopt their findings, noting that such evidence exceeded "clear and convincing standards of proof." In reaching that ultimate conclusion, the court rejected the alternatives advanced by Passaic Valley and Newark. In effect, it reasoned that their proposals were unfounded and inconsistent with the objectives to be achieved by the plan approved by the Department.

Our independent review of the record leads us to the same result. In reaching this conclusion we have duly noted that there is some countervailing evidence. We are also mindful of the contentions of appellants, based in some measure upon extra-record references, that the proposed plan to construct a filtration facility at Wanaque is actuated by motives to serve not primarily the demands of the inhabitants of the constituent members of North

Jersey but rather to cater to the needs of other municipalities and to abet other projects, such as the proposed Monksville Project. These considerations, however, do not dissuade us that the result reached by the trial court was eminently sound.

Most of the experts expressed the view that the location of a new filtration facility at Wanaque was optimum. Glen H. Abplanalp, a highly qualified expert associated with the engineering firm which had been retained by Passaic Valley and whose report was ultimately approved by North Jersey and the Department, concluded that the best location for the filtration plant was the Wanaque site at the headworks of the system. John Wilford, Chief of the Bureau of Potable Water of the State Department of Environmental Protection, underscored the State's approval of the engineers' report as to the location of the filtration plant at the Wanaque headworks. Dean C. Noll, the District's Chief Engineer, emphasized the need to meet future needs of the northeastern area of the State and that the Wanaque location has the greatest flexibility in that respect. Dr. William Oscar Lynch, a professional engineer who testified for Passaic Valley, recognized that Wanaque was the proper location for the plant (but that Passaic Valley should be adequately compensated) and that such a plant could be more economically run and constructed for less than it would cost to construct or renovate facilities at Little Falls.

Accordingly, we are satisfied that the court's determination upholding the Department's decision that a new filtration plant be constructed on the site of the Wanaque headworks was clearly reasonable and firmly based upon substantial evidence.

Appendix A

II.

Passaic Valley and Newark assert that they cannot be compelled to participate in the water supply system entailing new filtration facilities to be located at the Wanaque headworks nor can they be required to share proportionately with other members of North Jersey in the cost of such construction. It is argued that not only is there an absence of statutory and contractual authority to force the cooperation of these objecting municipalities in the proposed facility but that such a mandate would result in an "unconstitutional taking of their property."

This controversy must be understood in the perspective of the State's overriding concern and obligation to safeguard the public health. *West Caldwell* v. *Caldwell*, 26 N. J. 9, 30 (1958); *Dept. of Health* v. *Owens-Corning Fiberglas Corp.*, 100 N. J. Super. 366, 381 (App. Div. 1968), aff'd 53 N. J. 248 (1969). This encompasses a comprehensive power, coupled with a correlative duty, to control and conserve the use of its water resources for the benefit of all its inhabitants. *Trenton* v. *New Jersey*, 262 U. S. 182, 43 S. Ct. 534, 67 L. Ed. 937 (1923). It is a paramount governmental policy that such water supplies must be pure in quality, and be economically and prudently managed for the benefit of the public. See *Collingswood* v. *State Water Supply Commission*, 85 N. J. L. 673, 676 (E. & A. 1914). Designed to protect and promote the general health, safety and welfare, statutes regulating public water resources must be liberally construed to advance and achieve this underlying beneficent policy. *Jersey City* v. *State Water Policy Comm'n*, 118 N. J. L. 72, 76 (E. & A. 1937); *Newark* v. *N. J. Dept. of Health*, *supra*, 109 N. J. Super. at 177.

Appendix A

The Legislature has enacted various statutes which give the State regulatory and supervisory authority over the construction and operation of potable water supplies.* N.J.S.A. 58:11-1, 2 and 3 provide that no person may distribute or sell water for potable purposes, which in the opinion of the Department, is impure or obtained from a source which is or may become polluted; nor may any person distribute water without first obtaining from the Department approval of the source, and approval of detailed plans and specifications for any water treatment facility which the Department may require. N.J.S.A. 58:11-4 further provides:

> The department shall have the supervision of the operation of all water plants with respect to the purity of the supply of potable water furnished thereby, and every person furnishing water for potable use shall comply with any and all orders of the department relating to the purity of such waters. * * *

See also, N.J.S.A. 26:1A-37(i) and N.J.S.A. 26:2-65.

The State's ultimate control over its water resources is also reflected in N.J.S.A. 58:1-10 whereby the Division of Water Policy and Supply and the Water Policy and

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* At the inception of this litigation and generally throughout the proceedings, reference has been made to the Department of Health. However, all of the functions, powers and duties theretofore exercised by that Department and the Public Health Council relating to water supplies, including the authority vested by Chapter 11 of Title 58, N.J.S.A. 58:11-1 to 48, have been transferred to the Division of Environmental Quality and the Commissioner of the Department of Environmental Protection. L. 1970, c. 33, §10; N.J.S.A. 13:1D-7.

Supply Council (which succeeded to the authority of the former State Water Policy Commission pursuant to N.J. S.A. 13:1A-9) "have general supervision over all sources of potable and public water supplies * * * to the end that the same may be economically and prudently developed for public use."

Through N.J.S.A. 58:5-1 *et seq.*, the Legislature created two water supply districts and provided the commissions (one of which is North Jersey) created thereunder with powers sufficient to develop water supplies for any municipality in the State. In the construction of this legislation, it must be borne in mind that the "purity of the state's potable water supply is * * * a pre-eminent factor" in the proper exercise of such statutory powers. *Jersey City v. State Water Policy Comm'n, supra*, 118 N. J. L. at 75.

By virtue of this statutory authority, North Jersey is enabled to enter into contracts with municipalities for obtaining a water supply or for new or additional water supplies. N.J.S.A. 58:5-9 to 15. North Jersey is further empowered to carry out its contract with participating municipalities and to that end to construct filtration plants as may be necessary to fulfill its statutory objectives and indeed to exercise "all other powers necessary or proper to provide all of the contracting municipalities * * * with a sufficient water supply * * *." N.J.S.A. 58:5-16. After the completion of its water supply plant, works and appurtenances, North Jersey remains in sole control and charge thereof. N.J.S.A. 58:5-24. It also has the power to bring about municipal appropriations necessary to carry out its contract with participating municipalities. N.J.S.A. 58:5-15; and municipalities may be required to defray the costs of the construction of the water supply system as well as annual operating costs.

Appendix A

N.J.S.A. 58:5-22, 23. In a cognate statute, the Water Transmission Facilities Act, L. 1962, c. 167, N.J.S.A. 58: 5-31 *et seq.*, which has an indirect bearing on North Jersey's statutory powers herein, such costs could include major items of repair or reconstruction. N.J.S.A. 58: 5-34(8). If a municipality fails to make required appropriations, North Jersey has the option of treating the contract as abandoned by that municipality. N.J.S.A. 58:5-15. No such option, however, is given to contracting municipalities. Additionally, no participating municipality may obtain "any new or additional water supply" outside the system without the consent of North Jersey. *Id.*

From this statutory scheme, it is not unreasonable to posit an implied power in North Jersey, as a necessary incident to the continued maintenance and operation of its water supply system in accordance with state standards as to quality and purity, to provide not only for major repairs of existing plants but also to furnish additional facilities and improvements at the joint expense of the participating municipalities. *Cf. Passaic Valley Sewerage Comm'n* v. *Paterson*, 107 N. J. Super. 436 (Law Div. 1969), aff'd 113 N. J. Super. 148 (App. Div. 1971).

The contracts between North Jersey and the member municipalities, entered pursuant to statute are not inconsistent with a mutual and binding obligation to cooperate in the construction of additional facilities necessary to ameliorate the quality of the existing water supply in order to conform with state requirements.

The contract, with respect to the original construction of the reservoir and appurtenant facilities, provides:

> [T]he contracting municipality further authorizes and empowers the North Jersey District Water

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> Supply Commission, at the expense of the contracting municipality, as hereinafter provided, to maintain, repair and operate the said reservoirs, dams, works, pipe lines or conduits, when constructed.

The preamble of the 1918 contract between Newark and North Jersey, which is typical, contemplates "the operation and maintenance of said works when completed." North Jersey is empowered to maintain at the expense of the contracting municipality the entire system when constructed. Most significantly, reflecting its explicit statutory mandate, the contract provides:

> And the Commission covenants and agrees with the said contracting municipality to supply the water in the quantities and at the time above set forth, and further agrees to exercise all powers granted by the state laws to remove and prevent pollution, and any expenses incurred thereby shall be considered a part of the cost of operation and maintenance of the works herein provided for.

It is not to be assumed that these contracts are so inflexible as to leave the parties unable to deal with future contingencies. *Cf. North Jersey Dist. Water Sup.* v. *Newark, et al.*, 103 N. J. Super. 542 (Ch. Div.), aff'd 52 N. J. 134 (1968); *Nelson* v. *Kearny*, 4 N. J. Misc. 157 (Sup. Ct. 1926). Such an interpretation would deprive North Jersey of authority and financial means to provide for major repairs or the replacement or augmentation of facilities necessary to maintain the reservoir and the water supply system in compliance with lawfully adopted standards of purity. *Passaic Valley Sewerage Comm'n* v. *Paterson*, *supra*, 107 N. J. Super. at 440.

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We may agree with appellants that the contracts entered into pursuant to N.J.S.A. 58:5-1 *et seq.* are not directly affected by the additional statutory powers conferred on North Jersey by the Water Transmission Facilities Act. These provisions, however, are in *pari materia* with the statutory authority governing the relationship between North Jersey and its constituents. The rather explicit authority of the 1962 Act to enable North Jersey to construct additional projects, including filtration facilities, relating to the transmission of water made available by the State does not militate against the reasonable and necessary implication of a comparable authority to provide new facilities when needed as an integral part of its present water system. Moreover, we are not persuaded that the contracts, in the light of the operative statutes, as well as the circumstance that later contracts were entered into supplementing the 1918 and 1924 agreements, compel the execution of new agreements before this additional construction—required by the State to continue the proper operation of the present water supply system—can be undertaken.

It is to be emphasized that the proposed filtration plant is clearly not a new water supply project, for which a new contract might arguably be necessary. The engineers' report itself has characterized "the construction of pretreatment facilities followed by filtration" as being "in addition to * * * existing water treatment facilities." Indeed appellants do not reject the premise that very substantial physical improvements are required to improve the quality of water in the present water supply system. Rather the quarrel is only over technique and methodology, appellants preferring respectively to build a new filtration plant to service Newark and to upgrade the pressure plant at Little Falls in the case of Passaic Val-

ley. Mindful that the lower court reasonably found on the record no substantial evidence in support of these alternatives, we conclude that the judgment below upholding the order of the Department implementing the plan of North Jersey for the construction of a new filtration plant at Wanaque headworks, with the required participation of its local members, was correct and was consonant with applicable statutory and contractual authority.

III.

Appellants contend that just compensation was required since their compulsory participation in the building of "new filtration facilities at the Wanaque headworks constituted an unconstitutional taking of their property" and that the damages awarded by the court below are inadequate.

We do not understand the lower court, in making a damage award to Passaic Valley, to have determined that appellants were entitled to compensation on the theory that what occurred was an inverse condemnation of their property, in particular Passaic Valley's filtration plant at Little Falls. Nor do we perceive any basis for regarding the plan adopted by the Department as "so economically unsound as to render the shutting down of the Passaic Valley plant an arbitrary taking without just compensation * * *." *Newark* v. *N. J. Dept. of Health, supra*, 109 N. J. Super. at 179. As previously indicated the contrary conclusion—that the plan is economically sound and reasonable—is amply supported by this record.

The asserted economic injury expected by appellants cannot be equated with a taking of their property. A proper exercise of the police power does not give rise to a right to compensation even though the value of prop-

erty may consequently be reduced. *State* v. *Mundet Cork Corp.*, 8 N. J. 359, 371, *cert. den.* 344 U. S. 819, 73 S. Ct. 14, 97 L. Ed. 637 (1952). It is unquestionably within the State's police power to control and conserve the use of its water resources for the general welfare. *Trenton* v. *New Jersey, supra,* 262 U. S. at 185, 43 S. Ct. 534. To that end, the State may establish standards for potable water quality, and direct distributors of potable water to take steps necessary to achieve compliance with those standards. *Newark* v. *N. J. Dept. of Health, supra,* 109 N. J. Super. at 176. When the State acts pursuant to the police power to provide safe and adequate potable water supplies through the improvement of existing facilities, including new construction, the consequences to others who are injured or disadvantaged because of the resultant competition or obsolescence of their existing facilities, are not such as to require compensation under the State or federal constitutions. See *Denver* v. *New York Trust Co.*, 229 U. S. 123, 142-143, 33 S. Ct. 657, 57 L. Ed. 1101 (1913); *Madera Waterworks* v. *Madera*, 228 U. S. 454, 456, 33 S. Ct. 571, 57 L. Ed 915 (1913). See also *Bayshore Sewerage Co.* v. *Dept. of Environmental Protection*, 122 N. J. Super. 184, 207 (Ch. Div. 1973).

Against this backdrop, the award of $650,160 to Passaic Valley as damages or compensation for the abandonment of Passaic Valley's Little Falls pressure filtration plant was neither unjust nor unfair. The court made this award essentially on the basis of Abplanalp's testimony with certain adjustments. It represents the replacement cost of the filtration plant less depreciation.

Passaic Valley contends that this value is "only a small part of its damages" and "does not take into account the

total amount of the loss sustained by Passaic Valley." The additional loss, according to Passaic Valley, is occasioned by the order of the court that it "join the proposed project at the Wanaque headwaters." Therefore, it reasons that the true and full measure of value must necessarily "include [not only] the value of Passaic Valley's present plant * * * [but also] the capitalized value of the additional expense it will sustain."

Passaic Valley makes much of the reference in the engineering report and the mention by Abplanalp in his testimony that the "capitalized difference in water cost" to Passaic Valley might represent a more equitable approach. Three experts offered by Passaic Valley utilized a capitalization of expenses approach and estimated damages at $6,108,900, $6,006,900 and $4,812,500 respectively.

We concur in the rejection of these valuations by the trial court on the ground that they were speculative and conjectural. The estimated increased costs to Passaic Valley resulting from its participation in the new Wanaque facility were subject to many variables which were dependent upon several interrelated factors. Their evaluation would entail, according to Abplanalp, considerable comparative studies of the Little Falls plant and the proposed facility, analysis of direct operating expenses and costs of maintenance and administration of the Little Falls plant, the capital costs as well as the operating expenses for any pre-treatment facility which would be required at Little Falls, and other like factors. Moreover, as noted by the court, the "capitalized earnings theory expounded and amplified by Passaic Valley's experts * * * is grounded on assumed facts" which were not otherwise established. These related to improvements which would have to be made to the Little Falls plant in order to sat-

isfy State criteria and potability standards. For valuation purposes, we would agree that the court was on sound footing when it concluded that such improvements of the Little Falls plant were theoretical and probably would not be sufficient to warrant State approval and, therefore, were in the "realm of speculation."

Thus, in view of the absence of any constitutional or statutory basis for awarding damages as just compensation and in light of the evidence presented, it would appear that the damages awarded by the court to be paid by North Jersey to Passaic Valley, as an incident to the overall plan for providing acceptable water involving all of North Jersey's constituent municipalities, was reasonable.

IV.

It is contended that error was committed in authorizing North Jersey to issue bonds and pledge anticipated revenues to finance the proposed filtration plant. We may pass the argument that this question was not a trial issue since it involves essentially legal considerations. It was apparently conceived by the court as a supplementary or additional method for financing the costs of the construction of the proposed filtration plant.

The power to issue bonds in order to finance the construction of needed facilities may be reasonably implied. The original act, N.J.S.A. 58:5-1 to 30 contains no explicit authority for North Jersey to issue its bonds secured by a pledge of anticipated revenues. N.J.S.A. 58:5-7, however, confers on the Commission all necessary powers incident to corporate bodies. N.J.S.A. 14A:3-1(g) explicitly empowers corporations "to make contracts and guaranties and incur liabilities, borrow money, issue its

bonds, and secure any of its obligations by mortgage of or creation of a security interest in all or any of its property, franchises and income * * *." N.J.S.A. 58:5-9 implies the right of the Commission in its own name to incur necessary indebtedness, subject only to the limitation expressed in N.J.S.A. 58:5-39, that no lien may be placed on physical plant. This specific limitation is imposed by the Water Transmission Facilities Act, L. 1962, c. 167, §9. It is to be noted that there is no such restriction on the power of North Jersey to issue its own bonds secured by a pledge of anticipated revenues found in this legislation or in the earlier statute. Further N.J.S.A. 58:5-28 appears to limit the bonding power of a member municipality to the original contract amount, implying that additional expenditures may be financed directly by the Commission by its own bonds secured by anticipated revenues.

It is suggested that the Water Transmission Facilities Act is inapplicable in this context since it refers in general to facilities for the distribution of water made available by the State. As earlier noted, however, this act is in *pari materia* with the antecedent legislation and in this sense explicates the functions and powers of the Commission. N.J.S.A. 58:5-33 declares the public policy of the State to foster and promote the treatment, filtration and use of water supplies developed by the State. It provides further that public corporations be enabled to finance and construct necessary facilities for the distribution of "water made available by the State to municipalities and persons pursuant to the provisions of the Water Supply Law." North Jersey is specifically included. N.J.S.A. 58:5-34(2). And N.J.S.A. 58:5-42 through 51, grants the Commission the broadest powers to pledge its revenues to secure bonds issued for the purpose of carrying out

such powers. While the authority thus granted is reasonably clear, it does not, in our view, negative a comparable power vested in the Commission under the earlier legislation. We conclude, therefore, that the trial court properly determined that North Jersey was empowered to issue bonds secured by anticipated revenues in connection with the proposed filtration plant.

For the foregoing reasons, the judgment below is affirmed. No costs.

APPENDIX B

Order of the Supreme Court of New Jersey Denying Certification

(Filed—July 22, 1974)

SUPREME COURT OF NEW JERSEY

C-757 SEPTEMBER TERM 1973

STATE OF NEW JERSEY, *ex rel.*, DEPARTMENT OF HEALTH,

Plaintiff-Respondent,

vs.

NORTH JERSEY DISTRICT WATER SUPPLY COMMISSION,

Defendant and Third Party Plaintiff-Respondent,

vs.

CITY OF NEWARK,

Third Party Defendant-Respondent

and

PASSAIC VALLEY WATER COMMISSION,

Third Party Defendant-Petitioner.

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To Appellate Division, Superior Court:

A petition for certification having been submitted to this Court, and the Court having considered the same,

It is hereupon ORDERED that the petition for certification is denied, with costs.

WITNESS, the Honorable Richard J. Hughes, Chief Justice, at Trenton, this 22nd day of July, 1974.

FLORENCE R. PESKOE
Clerk

APPENDIX C

Order of the Supreme Court of New Jersey Granting Stay Under R. 2:9-8

(Filed—August 5, 1974)

SUPREME COURT OF NEW JERSEY

C-757 September Term 1973

STATE OF NEW JERSEY, *ex rel.* Department of Health,

Plaintiff-Respondent,

vs.

NORTH JERSEY DISTRICT WATER SUPPLY COMMISSION,

Defendant and Third Party Plaintiff-Respondent,

vs.

CITY OF NEWARK,

Third Party Defendant-Respondent,

and

PASSAIC VALLEY WATER COMMISSION,

Third Party Defendant-Petitioner.

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This matter having been heard upon the application of Newton M. Roemer, Attorney for Passaic Valley Water Commission, Third Party Defendant-Petitioner, hereinafter "Passaic Valley" and in the presence of Jane Sommer, Deputy Attorney General, appearing for William F. Hyland, Attorney General, Attorney for State of New Jersey, ex rel. Department of Health, Plaintiff-Respondent, and in the presence of Michael R. Perle, member of the firm of Teltser, Margolis and Franconero, Attorneys for North Jersey District Water Supply Commission, Defendant and Third Party Plaintiff-Respondent (Donald E. King, Corporation Counsel, City of Newark, Third Party Defendant-Respondent by Donald S. Coburn, not opposing), for a stay of the Order filed July 22, 1974, denying Petition for Certification; and the Court having considered the matter and having heard the argument of Counsel, and having concluded that such stay is justified;

It is, on this 5th day of August, 1974, ORDERED that pursuant to R. 2:9-8, the application to stay the performance and enforcement of the Judgment heretofore entered is granted, subject to the following conditions, which stay shall remain in effect until the Court as a whole acts upon the matter:

1. Passaic Valley shall prosecute forthwith and diligently its Petition for Certiorari to the Supreme Court of the United States, and all pleadings and papers required to be filed in connection with such application shall be filed not later than September 9, 1974.

2. All parties concerned in this matter shall file ten copies of any material which they wish this Court to consider pertaining to

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(a) The continuation of the stay herein granted; and

(b) Any other relief which any party may request

All such copies of material shall be filed by the parties independently and not responsively, not later than August 26, 1974.

For the Court

MORRIS PASHMAN, J.

Appendix C

Supplemental Order of the Supreme Court of New Jersey Modifying Stay Under R. 2:9-8

(Filed—August 28, 1974)

SUPREME COURT OF NEW JERSEY

C-757 September Term 1973

STATE OF NEW JERSEY, *ex rel.* Department of Health,

Plaintiff-Respondent,

vs.

NORTH JERSEY DISTRICT WATER SUPPLY COMMISSION,

Defendant and Third Party Plaintiff-Respondent,

vs.

CITY OF NEWARK,

Third Party Defendant-Respondent,

and

PASSAIC VALLEY WATER COMMISSION,

Third Party Defendant-Petitioner.

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This matter having been heard upon short telephone notice for an application to modify on Order Granting Stay Under R. 2:9-8; and the Court having considered the matter; and good cause being shown;

It is, on this 28th day of August, 1974, ORDERED that paragraph one of the Order Granting Stay Under R. 2:9-8 heretofore made on August 5, 1974 be and the same is hereby deleted, and in its place the following is substituted:

1. Passaic Valley shall prosecute forthwith and diligently its Petition for Certiorari to the Supreme Court of the United States, and all pleadings and papers required to be filed in connection with such application shall be filed not later than two weeks from the date of mailing notice of disposition by the Court as a whole of orders dated August 5 and August 28, 1974.

For the Court

MORRIS PASHMAN, J.

Appendix C

Order Continuing Stay of the Supreme Court of New Jersey

(Filed—September 9, 1974)

SUPREME COURT OF NEW JERSEY

M-23 September Term 1974

STATE OF NEW JERSEY, *ex rel.* Department of Health,

Plaintiff-Respondent,

vs.

NORTH JERSEY DISTRICT WATER SUPPLY COMMISSION,

Defendant and Third Party Plaintiff-Respondent,

vs.

CITY OF NEWARK,

Third Party Defendant-Respondent,

and

PASSAIC VALLEY WATER COMMISSION,

Third Party Defendant-Movant.

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This matter having been duly presented to the Court, it is ORDERED that the stay granted by order of Justice Pashman as modified by his order of August 28, 1974 be continued until September 23, 1974, provided that Passaic Valley Water Commission prosecutes diligently its petition for writ of certiorari in the United States Supreme Court and provided further that all pleadings and papers required to be filed in connection therewith shall be filed on or before such date; and it is further

ORDERED that the application for reconsideration is denied.

WITNESS, the Honorable Richard J. Hughes, Chief Justice, at Trenton, this 9 day of September, 1974.

FLORENCE R. PESKOE
Clerk

APPENDIX D

Oral Opinion of Trautwein, J.S.C. (July 26, 1972)

(Filed—July 26, 1972.)

SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION— PASSAIC COUNTY
DOCKET NO. C 2710—67

STATE OF NEW JERSEY ex rel.
DEPARTMENT OF HEALTH

Plaintiff

v.

NORTH JERSEY DISTRICT WATER
SUPPLY COMMISSION,

Defendant-Third Party Plaintiff

v.

CITY OF NEWARK, TOWN OF KEARNY,
BOROUGH OF GLEN RIDGE, TOWN OF MONTCLAIR
TOWN OF BLOOMFIELD, et als.

Third Party Defendants

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Hackensack, N. J.
July 26, 1972

Before:

THE HONORABLE THEODORE W. TRAUTWEIN, J.S.C.

Appearances:

STEPHEN L. GORDON, Esq., Deputy Attorney General,
For the Plaintiff.

ALBERT S. GROSS, Esq.,
For the North Jersey District Water Supply Commission.

NEWTON M. ROEMER, Esq.,
For the Passaic Valley Water Commission.

ROGER A. LOWENSTEIN, Esq.,
For the City of Newark.

(6.2)* The Court: This matter came on for trial after the following preliminary events and decisions occurred.

I. The Department of Health of the State of New Jersey, hereinafter Department, on January 24, 1966, issued an order to the North Jersey District Water Supply Commission, hereinafter Commission, requiring the Commission, prior to January 1, 1968, to improve, add to, or alter the Commission's water treatment facility located on the Wanaque River Watershed (Wanaque Reservoir) owned and operated by the Commission in order that the

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* Numerals in parenthesis refer to each new page of the stenographic transcript.

water received therein should be cared for and purified in a manner approved by the Department and prior to its distribution for public potable and culinary purposes.

II. The validity of this Order was tested before the Appellate Division, where Judge Matthews disposed of the two theories attacking the validity of this Order, vis-a-vis, the standards thereunder and the procedures followed in adopting them. See *State of New Jersey* v. *North Jersey District Water Supply Commission et al*, 109 N. J. Super. 166 (App. Div. 1970).

The remaining issues for the Chancery Division (6.3) concern:

(a) The power of the Commission to compel its constituent members to participate in a Commission plan for upgrading the supply of water from the Wanaque-Ramapo Watershed.

(b) If it could, then what plan for implementing the State's Order of 1966 should be adopted and enforced?

(c) If the plan adopted eliminated the Passaic Valley Commission's pressure filtration plant, hereinafter Passaic Valley, at Totowa, serving Paterson, Passaic and Clifton, constituent members of the North Jersey Water District, then what compensation should be paid Passaic Valley for the loss incurred, it being conceded that such a plan without more would be a taking without just compensation to Passaic Valley.

Findings

1. For a broad brush factual background, the Court incorporates by reference those findings and conclusions

set forth in Judge Matthews' opinion rendered in 109 N. J. Super. 166 (App. Div. 1970), and the Court's letter opinion of October 7, 1971, supplemented by two letters making technical corrections.

(6.4) 2. In some respects supplementing the citations aforesaid and in other respects highlighting those parts here pertinent, the Court finds further:

A. Commission is a public body owning, operating and maintaining a waterworks and supply system pursuant to the provisions of R.S. 58:5-1 et seq. as trustee and managing agent for eight municipal corporations, consisting of Newark, Kearny, Glen Ridge, Montclair, Bloomfield, Passaic, Paterson and Clifton, the latter three being represented by Passaic Valley Commission.

B. Commission supplies water for public potable and culinary purposes from the Wanaque River Watershed to the aforementioned eight communities which amount to approximately 110 million gallons daily.

C. The Commission derives all of its water through the Wanaque Reservoir which is fed directly by water from the Wanaque River and from the Ramapo River via a diversion. It serves an estimated population of 650,000 representing an average daily demand of 110 million gallons daily but sells all the water in bulk to other purveyors.

Purchasers of this water are Passaic Valley Water Commission approximately 35 million gallons (6.5) daily, Newark 45 million gallons daily, Bayonne 10 million gallons daily, Kearny 9 million gallons daily, Montclair 5 million gallons daily, Bloomfield 4.4 million gallons daily, and Glen Ridge, .75 million gallons daily. In addition, Cedar

Grove receives approximately 1 million gallons daily by purchase from Montclair.

D. Present treatment methods at Wanaque comprise only rough screening, pH adjustment by lime and disinfection by ammonia and chlorine. There is no treatment to reduce turbidity, i.e., flocculation and sedimentation, no filtration to provide a barrier against the ingress of particulate organic and biological matter into the distribution system, and no treatment to remove the manganese which is particularly troublesome in this supply.

E. Department on January 24, 1966 issued an order to the Commission requiring the Commission prior to January 1, 1968, to improve, add to or alter the Commission's water treatment plant located on the Wanaque River Reservoir, in order that the water received shall be cared for and purified in a manner approved by the Department prior to its distribution.

G. The Department was thereafter advised by the Commission on February 17, 1966 that a study committee had been formed consisting of engineers from all of the partners, that is, the constituent members of the Commission, to study the need for filtration of the Wanaque Reservoir waters.

Subsequently, the Commission advised the Department on March 2, 1967 that it entered into a contract with a consulting engineering firm to prepare the necessary study on filtration for submission to the Department in compliance with this order.

On January 12, 1968, Commission submitted the engineering study entitled "Report to North Jersey District Water Supply Commission, Water Filtration Plant Study,

December 1967." This study was reviewed by the Department and was accepted by the Department on February 1, 1968.

In fine, the Department found that the water being channeled from the Wanaque Reservoir did not meet the State and United States standards for potable water. This finding has been upheld by the (6.7) Appellate Division in the opinion of Judge Matthews, supra. It further ordered the Commission to do something about this inadequacy. The Commission has responded by providing the Department with a plan for a new filtration plant at Wanaque. The Department has approved the plan.

Of all the constituent members of the Water District, the City of Newark and Passaic Valley are the primary objectors to this plan. They wish to go it alone. This Court has previously ruled that they cannot. They are tied up in an indissoluble union and must participate in a single comprehensive plan.

Further amplifying on the position of the City of Newark and the Passaic Valley Water Commission, the Court finds their respective positions to be as follows:

(1) Newark says it can build a purification and filtration plant at its Belleville reservoir, or at the very least suggests that it ought to have the time to investigate into this type of plan to take care of its waters and the waters of several other constituent members of the Commission that it serves.

They suggest they can build this plant more economically than if they participated in the construction of a master works at the Wanaque head (6.8) works.

(2) Passaic Valley says that it has an existing pressure filtration plant at Totowa serving Paterson, Passaic and Clifton, which it can bring to meet State standards at a less dollar value than if it were assessed its proportionate share of the cost and operation of a new filtration plant at the head works at Wanaque.

Again, in fine, the City of Newark and Passaic Valley say they can take care of themselves for less dollars than if they are ordered to participate in an integrated plan for all of the eight communities. In other words, and at the risk of repetition, they wish to go it alone. And as the Court has stated before, it has ruled against this proposition.

(3) The Court further finds that neither the City of Newark nor Passaic Valley have come up with any formal comprehensive integrated plan meeting the requirements of the Department. What they have produced, simply stated, is a self-serving plan for taking care of their own and let the devil take the hindmost with respect to the remainder of the North Jersey Water District.

I find further that since January 24, 1966 the only party here pertinent that has presented a (6.9) comprehensive plan for approval of the Department of Health of the State of New Jersey which approval has been given is that of the Commission. This period of time involved some six and a half years. The situation by uncontradicted evidence is one that is critical and becomes more critical daily demanding immediate action.

(4) The Court gathers from the testimony presented at this plenary trial, that even though no formal plan has been proposed on an integrated comprehensive basis covering all eight consituent members that

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(a) the City of Newark proposes that it be empowered to erect a filtration plant at its Belleville reservoir serving itself and several other constituent members, and leaves the rest of the Water District to fend for itself insofar as any comprehensive plan is concerned, and whatever that plan might be it does not wish to participate financially in the same.

(b) Passaic Valley takes the point of view that it can update its pressure filtration plant at Totowa to take care of Clifton, Paterson and Passaic, and again leaves the rest of the problem in suspense for whatever solution the other constituent members (6.10) of the North Jersey Water District can work out in meeting the 1966 mandate of the Department.

(5) The Court finds that the recommendations of the consulting engineering firm, Havens and Emerson, by the overwhelming evidence presented in those reports submitted by said firm, compels the Court to approve the recommendations set forth therein for a new water treatment plant at the head works at the Wanaque Reservoir. The Court hereby adopts the findings as set forth in the various reports of Havens and Emerson as marked in evidence. The evidence in this respect is overwhelming beyond clear and convincing standards of proof.

(6) Assuming that the Passaic Valley's suggestion that the North Jersey District Commission build a water treatment plant at its property just below the Passaic Valley Water Commission's plant at Totowa, which would in effect be the Passaic Valley saying, "We will take care of Paterson, Passaic and Clifton, and you build your plant to take care of the rest of the constituent members of the District." I find the following, based on the testi-

mony of Dean C. Noll, which overwhelmingly rules out such a choice as compared with building a plant at the head works; in addition to the reasons given by Mr. Abplanalp and (6.11) the exhibits P-1, P-2 and P-3 marked into evidence.

Such a choice would involve over a half million more in capital expenditures. It would all but double Newark's contribution to such a plant. Naturally, it would favor Passaic Valley by some $200,000. But as respects all other members of the Water District, it would increase their contributions as compared to a new works at Wanaque by the following:

Kearny—if the plant were built at Wanaque, there would be a contribution of $179,820 as compared with $315,407.

Montclair—$71,175 as compared to $131,365.

Bloomfield—$56,940 as compared with $105,190.

Glen Ridge—$10,676 as compared to $19,632.

The other constituent members' loss, in fine, would be Passaic Valley's gain.

The Court concludes from the above that in order to comply with the State's order of January 24, 1966, the evidence compels the erection and construction of a new filtration plant at the head works in Wanaque.

This conclusion is further fortified by evidence presented to the Court that from a long range planning viewpoint, considering further requirements of this water supply district, the main plant (6.12) should be located at Wanaque.

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I find and conclude that tested in the light of economic feasibility and reasonableness and sound engineering practice, the location at Wanaque is indeed the proper choice.

The issue of economic feasibility as framed in the pretrial order did not comprehend the suggested oversimplistic test that if one or more partners in the Commission could satisfy minimum State standards by some fragmented updating and/or building of satellite plants at less cost than an integrated plant at the head waters, then the head works should be ruled out.

Rather, in accordance with Judge Matthews' suggestion, economic reasonableness should be tested under the broadest of spectrums, the greatest good for the greatest number. See also *City of Newark* v. *North Jersey District Water Supply Commission*, 106 N. J. Super. 88 (Ch. 1968), an opinion by Judge Mintz.

The second question to be dealt with concerns Judge Matthews' direction that if indeed the Passaic Valley operation is inadequate and the overall plan dictates a filtration plant at the head works of the Wanaque Reservoir, then what in fact and in law would be just compensation for the elimination of (6.13) the pressure filtration plant at Totowa owned by the Passaic Valley Water Commission which will be rendered inoperative and useless by the adoption of this integrated and comprehensive plan?

This question involves matters of law that may or may not in some respects be unique in the judicial history of this state. This is not a classical problem involving one public utility exercising its right of eminent domain over the real property of another public utility under the theory of prior user.

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Indeed, no real property of the Passaic Valley Water Commission will be condemned and therefore paid for if the master works are built at the Wanaque Reservoir.

What the implementation of the plan calls for is that the Passaic Valley Water Commission will have to abandon its pressure filtration plant at Totowa, the plant that services Passaic, Clifton and Paterson, with respect to a water supply drawn from the Wanaque Reservoir.

It should be noted that the operations of the Passaic Valley Water Commission will not be entirely eliminated in that this Commission will still operate a gravity filtration plant for the use of other waters drawn from the Passaic River for other (6.14) communities that it serves.

With respect to this question, i.e., what compensation shall be paid by the Commission for the abandonment of Passaic Valley's filtration plant, the pressure filtration plant located at Totowa, the Court has considered carefully the testimony of witness Abplanalp called by the Commission respecting this question of compensation to Passaic Valley.

In connection with this question the Court concludes that the testimony of Abplanalp on direct examination as to the compensation to be paid Passaic Valley subject to certain adjustments hereinafter set forth should be adopted.

In other words, $580,500 as of June 1970 with an upward adjustment of 6% due to inflationary factors. This would result in an adjustment of $69,660 for the two-year period, or a total sum to be paid to Passaic Valley of $650,160.

The Court further finds that the testimony of Passaic Valley's experts and the suggestion of Abplanalp that the

capitalized income method of evaluation might be more acceptable are without merit within the context of the testimony in this case. The principles and factors involved in such a method of evaluation are initially, as the Court observed, (6.15) far too speculative to be acceptable to this Court.

Moreover, the problem posed has certain singularly unique characteristics that remove it from the classical framework of a "taking" as understood in eminent domain proceedings.

The constituent members of the Commission are wed as the Court has said in an indissoluble union. Together they are charged with, through the aegis of the Commission, the responsibility to provide potable water to the citizens within their borders.

A state facility having competent jurisdiction, the Department, has found they are not so doing. One of the failures is attributable to Passaic Valley's inability to consistently meet the standards established by the Department.

Passaic Valley has suggested that it can meet these standards. The testimony of the experts in this case compels the Court to the conclusion that there is serious doubt that Passaic Valley can ever do so.

Yet Passaic Valley suggests that if the pressure filtration plant at Totowa is ruled out of usable existence by the implementation of the State approved plan for a new integrated plant at the head works, then the formula for computing the damages visited (6.16) upon Passaic Valley for a partial taking, that is the rendering useless of its pressure filtration plant at Totowa, should be based on the capitalized earnings value of that facility rather

than a reproduction cost less accrued depreciation basis or book value less accrued depreciation adjusted for changes in the cost of material and labor, which the Court has indicated it accepts.

The capitalized earnings theory expounded and amplified by Passaic Valley's experts must be rejected. It is grounded on assumed facts, vis-a-vis, capital improvements to bootstrap the plant to the level of State Department approval that have no foundation in fact.

The so-called improvements assumed and equated in dollar amounts by the experts have not been acceptable to the State, and hence enter the realm of speculation to such an extent as to require rejection.

See *State* v. *Mehlman*, 118 N. J. Super. 587 (App. Div. 1972); *Port of N. Y. Auth.* v. *Howell*, 68 N. J. Super. 559 (App. Div. 1961); certification denied, 36 N. J. 144 (1961); *Arlen of Nanuet, Inc.* v. *State of New York*, 26 N. Y. 2d 346, 310 N. Y. S. 2d 465 (Ct. of App. 1970).

(6.17) In conclusion, the Court notes the following: This matter has been dragging since January 24, 1966. In the interim, the citizens of the State of New Jersey are the only ones that have felt the impact of the passage of time, being deprived of potable water, and the time for action is now by the North Jersey District Water Supply Commission.

N.J.S.A. 58:5-22 places the cost of construction on the municipalities being members of the District in proportion to the amount of water contracted to be taken, referable to the construction of the water works.

N.J.S.A. 58:5-36 gives the Commission the power in its own name to use the revenues it receives in its District operation to secure the payment of any bonds and notes.

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N.J.S.A. 58:5-39, while denying the Commission the right to pledge or mortgage the physical plant acquired, does not prevent a pledge of anticipated revenues.

N.J.S.A. 58:5-43, subject only to the foregoing exception, gives the Commission the broadest power to finance its project by issuance of bonds.

The Court concludes that implicit in the statutory scheme, the organic act creating these (6.18) districts, is the right of the district to initiate the mechanics of financing construction of water works through anticipated revenue bonds or notes in the event members default on their obligations to individuals and in concert finance such projects otherwise justified, despite anything to the contrary contained in the original and amended contracts within the District.

To do otherwise would be to fly in the face of reason when all of the sections of the statutes on water districts are read in pari materia.

The statute, as the Court construes it, provides that each constituent member of the water district shall contribute to the cost of operating the district and its water works in direct proportion to the amount of water it takes from a district.

The water works can be financed under the statute by the various municipal partners floating their own bonds or different types of financial paper. The statute bifurcates the rights attaching to this extent. It also gives the same rights, as the Court sees it, to the water district, except that the water district cannot mortgage its real property or its water works.

I think the Legislature took a realistic view of this matter. Probably in its wisdom it anticipated (6.19) that

despite great urgent necessity and despite the fact that there were contractual obligations flowing amongst the parties and to the water district, that on occasion an impasse would be reached such as the one that was reached since January of 1966, where certain members of the District have refused to comply with orders of the State as to the implementation of the plan proposed by the District Commission itself. Therefore, the other sections of the statute can come into play.

This Court, therefore, authorizes the North Jersey District Water Supply Commission to finance the construction of a water refining plant at its head works at Wanaque and to issue its bonds secured by a pledge of its revenues.

The Court is aware that this issue was not framed in the pretrial order. However, the Court exercises its inherent jurisdiction to see that whatever imprimatur it puts upon the plan as suggested it should be realistically achievable. The impasse cannot remain.

If the municipalities refuse to take action and further litigation has to be invoked to compel them to perform, then more and more time is wasted. The head works must be gotten underway. There was (6.20) testimony as to the increased daily cost of this plant for every day that the matter dragged on.

Therefore, absent some stay from another court, North Jersey Water District should implement the plan as suggested by the Court.

An order conformable to this opinion should be submitted under the five-day rule, or consented to as to form.

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It may incorporate by reference the findings of fact and conclusions of law as I have stated them in this oral opinion this date.

The Court reserves unto itself the right to supplement or amend this opinion in the event of an appeal.

Mr. Gross: Thank you very much.

The Court: I will retain the exhibits for the period within which to take an appeal after the order is signed.

Mr. Roemer: Your Honor, do I take it from your concluding remarks that counsel may consider that an application for a stay is denied?

The Court: Yes. I don't know whether I should give you that. The time is so short before I am going on vacation, I will consider that you are now making an application for the stay. And, Mr. Gross, (6.21) you are resisting that application.

Mr. Gross: I am indeed, sir.

The Court: Then I will deny the application for the stay.

Mr. Roemer: Your Honor, so that when and if application is made to the Appellate Division, counsel then may represent that the trial division has denied the application?

The Court: That is correct, Mr. Roemer.

Mr. Roemer: Thank you, sir.

The Court: When you make that application, I'm sure they are going to want to have my findings.

Mr. Roemer: Yes, of course.

APPENDIX E

Letter Opinion of Trautwein, J.S.C. (October 7, 1971)

(Filed—October 7, 1971)

SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION
Court House
Paterson, N. J. 07505

Theodore W. Trautwein
Judge

October 7, 1971

Gentlemen:

Re: State of New Jersey ex rel.
Department of Health
vs. North Jersey District Water Supply Commission, et als.

Docket C-2710-67

Superior Court of New Jersey
Chancery Division—Passaic County

Cross motions for partial Summary Judgment were brought on by third-party plaintiff, North Jersey District Water Supply Commission, hereinafter "North Jersey" and some third-party defendants, Passaic, Newark, Clifton and Passaic Valley Water Commission hereinafter "Passaic Valley".

The basic question to be decided is whether or not, as a matter of law, there is any basis-contractual, statutory or otherwise for compelling these third-party defendants to participate in the funding of a new or expanded exist-

ing filtration plant for the treatment of potable water, as devised by "North Jersey", and necessitated by an order of the New Jersey State Department of Health, hereinafter "Department", requiring the upgrading of the quality of water supplied to constituent members of the District of which third-party defendants are several.

I have considered the pleadings, affidavits, briefs and argument of respective counsel and conclude that the motion of the third-party plaintiff, North Jersey, should be granted and accordingly that of the third-party defendants denied.

There are no genuine issues as to any material facts challenged. That which governs on these motions is uncontradicted, to wit:

1. The opinion of Judge Matthews in 109 N. J. Super. 166 (App. Div. 1970).

2. N.J.S.A. 58:5-1 et seq.

3. Original contracts and supplements thereto of the constituent municipalities with North Jersey.

4. Orders of the State Department of Health of January 24, 1966.

The Department of Health of the State of New Jersey, on January 24, 1966 pursuant to N.J.S.A. 58:11-1 et seq., required that North Jersey, prior to January 1, 1968, alter the treatment plant at the Wanaque Watershed to purify its water prior to distribution to third-party defendants, Town of Bloomfield, City of Clifton, Borough of Glen Ridge, Town of Kearny, Town of Montclair, City of Newark, City of Passaic and City of Paterson, which mu-

nicipalities derive part or all of their water supplied from the Wanaque Reservoir operated by North Jersey. Clifton, Passaic and Paterson secure their proportionate share of this supply through the aegis of Passaic Valley through whose facilities it is transmitted by the District. Passaic Valley, a public water works body, created under N.J.S.A. 40:62-108 et seq., and owned by the Cities of Paterson, Passaic and Clifton has operated filtration and treatment facilities at its Little Falls plant since about 1934. Its source is the Wanaque Reservoir operated by North Jersey and the Passaic River. Apparently, while Paterson, Passaic and Clifton were constituent members of North Jersey, they saw fit, for their common good, to create Passaic Valley in order to treat non-North Jersey water and Passaic River water to meet their expanding needs. For background history, see *Passaic Water Co.* v. *McCutcheon*, 105 N. J. L. 437 (E. & A. 1928); *North Jersey* v. *State Water Commissioners*, 129 N. J. L. 326 (Sup. Ct. 1943); *Ogden* v. *Dept. of Civil Service*, 77 N. J. Super. 296 (App. Div. 1962); *Boyle* v. *De Nooyer*, 39 N. J. 245 (1963).

A complete factual background of the instant case is set forth in Judge Matthews' comprehensive opinion *City of Newark* v. *Department of Health*, 109 N. J. Super. 166 (1970) wherein the validity of the Department of Health's order requiring improved filtration was upheld. Newark, Clifton, Passaic, Paterson and Passaic Valley in their motion for partial summary judgment argue that there is no contractual or statutory basis for compelling their participation in the cost and operation of a new or enlarged filtration plant under a plan developed by the Department and adopted by North Jersey. North Jersey, in turn, moved for partial summary judgment affirming its

power to compel financial backing by its contributing municipalities of its plan, reserving for subsequent determination in this Court, the reasonableness of the plan vis-a-vis, location of the plant, the amount of capital required, the method of payment and the computation of the respective contributions of the constituent municipalities, and, indeed, urges this Court to retain jurisdiction in compliance with the holding of the Appellate Division wherein said Court noted that under the Department's plan, as adopted by North Jersey, Passaic Valley

> "• • • will be compensated for the partial shutting down of its facilities. However, whether Passaic Valley's treatment is adequate, whether the particular plan settled on by the Department is so economically unsound as to render the shutting down of the Passaic Valley plant and arbitrarily taking without just compensation, or indeed, whether Passaic Valley would be compelled to join in the construction of a new plant, in substitution of its own facility, are matters to be dealt with at the plenary hearing in the Chancery Division."

In fine, while all parties now are bound by the Order of the Department to upgrade water, Newark wishes to comply, as to its share of water from North Jersey, by building its own treatment plant at its Belleville reservoir. Passaic Valley, speaking for Paterson, Passaic and Clifton, wishes to retain its present facility at Little Falls and says it will upgrade that plant to the extent necessary to comply with the Department's order. They tell the rest of the constituent municipalities to do what they wish, either independent of or with North Jersey, in some improved filtration plant at the Wanaque head waters in

order to comply with the Department's order. Dollars and cents, imaginary or otherwise, are at the roots of these positions. Newark with a 40.5% interest in North Jersey obviously feels it can upgrade its water independent of North Jersey at less cost than its proportionate share of a master works at the head waters. Passaic Valley, for Clifton, Paterson and Passaic, with a 37.75% interest in North Jersey adopts the same reasoning.

I conclude that the District has the obligation and the power to compel its constituent municipalities to contribute to the cost and operation of a new or enlarged filtration plant or plants. In *City of Newark* v. *Dept. of Health, supra,* involving this very case, the Appellate Division held:

> "The safeguard of public health is an essential function of government and is of primary concern to the social order * * *." *Borough of West Caldwell* v. *Borough of Caldwell,* 26 N. J. 9 (1958); *Dept. of Health* v. *Owens-Corning Fiberglas Corp.,* 100 N. J. Super. 366 (App. Div. 1969), aff'd 53 N. J. 248 (1969).

Without question, the State has the power, and it is the duty, to control and conserve the use of its water resources for the benefit of all of its inhabitants. *City of Trenton* v. *New Jersey,* 262 U. S. 182, 43 S. Ct. 534, 67 L. Ed. 937 (1923).

The Statute here pertinent, N.J.S.A. 58:5-1, defining the organizations and powers of North Jersey must be liberally construed in order to advance its beneficent policy. *City of Newark* v. *Dept. of Health, supra,* N.J.S.A. 58:5-57. An analysis of pertinent sections of the enabling act,

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N.J.S.A. 58:5-1, demonstrates that the District has the power to compel funding of a revitalized filtration plant.

Sections 1-14 demonstrate that the contracting municipalities hold the purse strings, but may not withhold making appropriations to fund the North Jersey District programs, absent arbitrariness, capriciousness or unreasonableness in the planning of North Jersey programs.

Section 15 grants the right to North Jersey to "take appropriate action to bring about the making of the appropriation * * *" required to carry out the contract.

Section 16 describes the power of North Jersey in the broadest language and specifically the authority to construct a filtration plant.

Section 22 requires each municipality to pay its proportionate share of the cost of construction of the water supply system.

Section 27 requires North Jersey's consent for any municipality within a water supply district to obtain any new water supply from any water shed other than the existing water shed.

Section 28 enables contracting municipalities to borrow money and issue bonds and notes to make contractual payments.

Section 33, enacted in 1962, declares the broad public policy of the State to do everything possible to enable financing, construction and operation of facilities necessary for the treatment, filtration, transmission and distribution of water to municipalities and persons through the grant of additional powers to certain public corporations heretofore so authorized.

Appendix E

Section 32 defines "operating expenses" in addition to the usual connotation thereof as "all costs and expenses of operating, maintaining, managing, repairing and reconstructing a project • • •".

Section 35 declares North Jersey "an instrumentality exercising public and essential governmental functions and to provide for the public health and welfare".

Again in Section 34 "construct" and "construction" connote and include, in addition to the usual connotations thereof, acts of construction, reconstruction, replacement, extension, improvement and betterment of a water transmission facility. "Participant" means any municipality which has accepted or which may thereafter accept a contract with a Commission providing for the raising and payment of funds to meet the cost of acquisition and operation of a water supply or additional water supply pursuant to the terms of the original act.

Section 36 gives North Jersey power to reconstruct water commission facilities in the broadest language.

Section 37, in addition to directing liberal construction, of this legislation, provides that the powers granted to North Jersey are granted in addition to and not in substitution for existing powers or duties of North Jersey and are not subject to any limitation or restriction prescribed in the original act or by any other law excepting only the water supply law.

It is abundantly clear that the District was created to meet the State's obligation to control and conserve its water resources for the benefit of all its inhabitants as trustee for the participating municipalities. *City of Bayonne* v. *North Jersey District Water Supply Commis-*

sion, 30 N. J. Super. 409 (App. Div. 1954). And having entered into the system, no municipality or combination of municipalities has the power to withdraw against the will of the District and so disrupt and demolish a water supply system intended by the Statute to benefit all the people of the entire State. I view the original contracts entered in to between North Jersey and the municipalities not only as individual compacts, but taken as a whole, creating in the larger sense an indissolvable union, from which none could secede except under those particular conditions prescribed by the Statutes authorizing the union. See for example, Section 27 N.J.S.A. 58:5-27.

Moreover, page 12 of the contract between the City of Newark and the District provides:

> "And the Commission covenants and agrees with the said contracting municipality to supply the water in the quantities and at the times set forth, and further agrees to exercise all powers granted by the State laws to remove and prevent pollution, and any expenses incurred thereby shall be considered a part of the cost of operation and maintenance of the works herein provided for." See also *Passaic Valley Sewerage Commission* v. *City of Paterson,* 107 N. J. Super. 436 (Law Div. 1969), aff'd 113 N. J. Super. 148 (App. Div. 1971).

The third-party defendants have been wedded to the District for some 53 years. Several of them, including the City of Newark, subsequent to the order of the State Department of Health for the upgrading of filtration, in Judge Matthews' words:

> "• • • for some reason, the soundness of which escapes us, decided to go it alone." *City of Newark* v. *Department of Health, supra,* at p. 175.

Suddenly they press for a bill of limited divorcement; they will take the water but hold North Jersey to its contract, vis-a-vis, daily gallonage availability; but want to treat the water themselves under some theory that they can bifurcate the contract and abandon portions at will.

Nothing before the Court justifies such conduct. It can only be characterized as a fragmentation at will that can only result in chaos and the ultimate demise of North Jersey as a viable entity.

An order conformable to this opinion should be submitted with consent as to form or under the five day rule.

The remaining issues shall proceed to a plenary trial which date is fixed for January 24, 1972.

Very truly yours,

T. W. T.
THEODORE W. TRAUTWEIN

TWT:dc

Appendix E

Corrections to Letter Opinion of Trautwein, J.S.C.

SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION

Court House
Paterson, N. J. 07505

Theodore W. Trautwein
Judge

October 21, 1971

Roger A. Lowenstein, Esq.,
Assistant Corporation Counsel,
The City of Newark,
City Hall,
Newark, N. J. 07102

Dear Mr. Lowenstein:

Re: State of New Jersey ex rel.
Department of Health

vs. North Jersey District Water Supply Commission
Docket C-2710-67

This is to advise, in response to your request, that I signed the Order in the above matter on October 20, 1971.

I have re-examined my letter opinion of October 7, 1971 and wish all of you to note the following correction for the purpose of the record in the event of an appeal:

> The first word in the next to the last line on Page 4 of my Letter Opinion should read "some" instead of "come".

Very truly yours,

T.W.T.
THEODORE W. TRAUTWEIN

TWT:dc

Appendix E

cc. to Stephen L. Gordon, Depty. Atty. Genl.
Albert Gross, Esq.,
Paul J. McCurrie, Esq.,
George H. Callahan, Esq.
Joseph D. Lintott, Esq.
Newton M. Roemer, Esq.
Robert B. Shepard, Esq.

Appendix E

Additional Corrections to Letter Opinion of Trautwein, J.S.C.

SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION

Court House
Paterson, N. J. 07505

Theodore W. Trautwein
Judge

Gentlemen:

Re: State of New Jersey ex rel.
Department of Health

vs. North Jersey District Water Supply Commission, et al.

Superior Court of New Jersey
Chancery Division—Passaic County

Docket C-2710-67

In re-reading my letter opinion of October 7, 1971 in the above matter, I find that the following additional corrections should be made and incorporated in the appendix on appeal:

1. The quotation on page 4 of my letter opinion from 109 N. J. Super. 166 (1970), at p. 179, should read as follows:

"We note that under the Department's plan, Passaic Valley will be compensated for the partial shutting down of its facilities. However, whether Passaic Valley's treatment is adequate, whether the particular plan settled on by the Department

is so economically unsound as to render the shutting down of the Passaic Valley plant an arbitrary taking without just compensation, or indeed whether Passaic Valley will be compelled to join in the construction of the new plant in substitution of its own facility, are matters to be dealt with at the plenary hearing in the Chancery Division."

2. The third line following the quotation on page 5 of my letter opinion should read:

"has the power, and it has the duty, to control and conserve the use of its • • •"

3. The seventh line from the bottom of page 5 of my letter opinion should read:

"The Statute here pertinent, N.J.S.A. 58:5-1, defining the or—• • •."

Strike the letter "s" from the word "organizations" immediately following.

T.W.T.
Very truly yours,

THEODORE W. TRAUTWEIN

TWT:dc

APPENDIX F

Post Trial Correspondence

SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION—PASSAIC COUNTY
DOCKET NO. C 2710—67

STATE OF NEW JERSEY ex rel.
DEPARTMENT OF HEALTH

Plaintiff

v.

NORTH JERSEY DISTRICT WATER
SUPPLY COMMISSION,

Defendant-Third Party Plaintiff

v.

CITY OF NEWARK, TOWN OF KEARNY,
BOROUGH OF GLEN RIDGE, TOWN OF MONTCLAIR
TOWN OF BLOOMFIELD, et als.

Third Party Defendants

Appendix F

PASSAIC VALLEY WATER COMMISSION
LAW DEPARTMENT
1525 MAIN AVENUE
CLIFTON, NEW JERSEY 07015
(201) 772-3900

NEWTON M. ROEMER
Counsel & General Attorney

May 15, 1972

Honorable Theodore W. Trautwein
Room 302
Court House
Hackensack, New Jersey 07601

Dear Judge Trautwein:

RE: State of New Jersey ex rel. Department of Health v. North Jersey District Water Supply Commission v. Passaic Valley Water Commission et als

Docket No. C-2710-67

Your Honor was kind enough to invite Counsel to submit such Memoranda as might be helpful in the disposition of this matter.

Accordingly, this letter will concern itself with the relationship between income, expenses, capitalized earnings value, and the figure of $4,812,500. as testified to on May 2nd by Dr. William O. Lynch, and as detailed in his May 1 Report.

That Report, marked DP-5 in evidence, developed and recommended payment of that figure to Passaic Valley Water Commission if it must abandon its existing pressure filter plant and join with the other partners in the proposed Wanaque plan.

Appendix F

Although the Report was introduced in evidence, the circumstances of the trial precluded Dr. Lynch from giving direct testimony on the last four pages of the Report, together with such clarification as might have resulted from further questioning by the Court or Counsel.

Earlier in the trial, reference was made to the use of "capitalized earning value" as a measure of worth. As stated on page 8 of the May 1 Report, this factor is based on the perpetual earnings or net profit of a facility or business at a stated rate of return, such as five percent (5%) per year. For example, a business whose annual profits are $1,000 per year would have a "capitalized earning value" of $1,000 divided by 0.05 (assuming 5% interest) or $20,000.

Because Profits equal Income less Expenses, it does not matter whether the $1,000 per year is achieved by an income of $101,000 against expenses of $100,000 or whether it is achieved by income of $11,000 against expenses of $10,000; the "capitalized earning value is still $20,000. To achieve the same result, both income and expenses could be "capitalized" before expenses are subtracted from income. Thus, "capitalized earning value" is also the excess of "capitalized income" over "capitalized expenses".

"Present worth" may be considered as capitalization for a specific period of time, whereas true capitalization or capitalized value is "in perpetuity". The "present worth" of an expense or income item, therefore, approaches the true capitalized value of that expense or income item more closely as the time span increases.

In the cases of economic comparison presented in the May 1 Report, only the estimated expenses for each plant were considered. Normally, expenses are thought of as

annual items, but any one-time cost or expense can be converted to an annual figure, or vice versa, through the use of compound interest tables that show the time value of money. The replacement cost less depreciation of an existing physical facility, or the cost of a new one, is just as much an expense item as are the more obvious operating expenses for labor, chemicals, power, etc.

Because a public facility is not expected to make a profit, it must be assumed that the income of a water works facility would normally be adjusted through water rate revenues to equal the required expenses. In the case in question, because "Total Present Worth" or "PVWC Share of Total Present Worth", as presented in Tables 1, 5, 6, and 7 of the May 1 Report, may be considered as "capitalized expenses", any saving in one plant's total present worth over another may be thought of as "capitalized income" in favor of the less costly plant. In Table 6, the entries opposite "Additional P.W. for PVWC to participate in Wanaque Plant" represent just such "income" in favor of PVWC's pressure filter plant.

Because the pressure filter plant actually exists, its remaining value, which is not salvageable, also must be added to the loss of "capitalized income" to compensate PVWC for abandonment of that plant. Because the "replacement cost less depreciation" of the PVWC plant is a part of the "total present worth" of that facility, it is subtracted from PVWC's share of the "total present worth" of the Wanaque plant to reach the "Additional P.W." values noted: its later addition to "Additional P.W." results in the same "Total Extra Cost" to PVWC regardless of the method of depreciation used for the existing plant.

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Perhaps the points about expenses and income may be better seen in Table 7, which assumes both plants to be new, hence there is no complicating effect of depreciated replacement value. For a 40-year period, the PVWC pressure plant would have a total present worth of $6,227,000, which corresponds to equal annual expenses of $362,900. PVWC's share of the total P.W. of the Wanaque plant, $11,220,000, corresponds to equal annual expenses of $653,900. Thus, the loss in annual "income" to PVWC, or the extra annual expense, would be the $291,000 shown in Table 7. Because the results of Table 6 represent a more rigorous treatment of the whole problem, including periodic replacement of certain elements, the final figure in Table 7 reduces to the $280,500 per year for 40 years shown in Table 6 and on page 10 of the May 1 Report.

The testimony and report of Dr. Lynch is bottomed upon substantial, competent, relevant evidence. It expresses Passaic Valley's pecuniary damage in classical investment terms which have been the ". . . dominant yardstick in New Jersey." In re Plainfield-Union Water Co., 57 N. J. Super. 158, 176 (App. Div. 1959).

It is beyond dispute that this pecuniary damage would be the direct result of the State's insistence that Passaic Valley join the other partners in the proposed Wanaque project. This insistence has received the approval of this Court by its earlier determination on Motion for Summary Judgment, holding that the Wanaque partners were forever married to each other, notwithstanding that the partners themselves and North Jersey have not dealt so with each other in the past.

The testimony of North Jersey's expert, Glen H. Abplanalp, clearly established the soundness of including capitalized losses as part of the total damages Passaic

Valley would sustain. The amount of these damages has been thoroughly developed and justified by Wendell R. Inhoffer, Dr. John E. Maher, and Dr. Lynch.

Bearing in mind that the State has not ordered Passaic Valley to upgrade the quality of its water, and that the record is devoid of proof that Passaic Valley's water does not or cannot meet proper State standards, it is for the Court to determine in the light of the facts in this particular case, the weight to be given to the quantum of damages, as contended by PVWC.

It is well established that ". . . value depends upon use and is measured or at least significantly indicated by the profitableness of present and prospective services rendered that are just and reasonable as between the owner of and those served by the property." *Denver Union Stockyards Co. v. United States,* 304 U. S. 470 (at p. 479); 82 L. Ed. 1469 (at p. 1478), and cases cited.

On the general question of expert testimony, we believe that an appropriate starting point is Rule 56 of the New Jersey Rules of Evidence, which provides in pertinent part:

> "(2) If the witness is testifying as an expert, testimony of the witness in the form of opinions or inferences is limited to such opinions as the judge finds are (a) based primarily on facts, data or other expert opinion established by evidence at the trial and (b) within the scope of the special knowledge, skill, experience or training possessed by the witness."

In the comment following the rule, abundant authorities will be found to support Passaic Valley's contention that the testimony and reports adduced by its several expert

witnesses is dependable and should be adopted by the Court in the resolution of the issue of damages.

The comment on page 228 of the Rules of Evidence states, in Section 56(2)-1:

> "Under Rule 56(2), expert opinion testimony is admissible if the Court finds that the expert is qualified, and that, the opinion is based primarily upon evidence adduced at trial."

Likewise, in the comment on Section 56(2)-2, also on page 228, it states:

> "Expert testimony is admissible where the witness has peculiar knowledge or experience not common to the world which renders his opinion an aid to the court or jury in determining the question in issue. See *Nesta* v. *Meyer*, 100 N. J. Super. 434, 242 A. 2d 386 (App. Div. 1968)."

In considering what expert opinion must be based on, the comment under Section 56(2)-4, at page 229 of the Rules of Evidence provides, among other things:

> ". . . that the expert's opinion need not rest entirely on matters established by the evidence. In addition to basing his opinion on the expert opinions of others (which is now made permissible contrary to the suggestion in *Stanley Co. of America* v. *Hercules Powder Co.*, 16 N. J. 295, 108 A. 2d 616 (1954) an expert may base his opinion partly on hearsay. Indeed, N.J.S. 2A:83-1 provides that a witness, testifying as to the value of real estate, may give hearsay evidence relating to the sales of comparable land."

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It is well settled, as the comment states, that the weight to be given the expert opinion rests upon the facts which support it.

> "The expert may rely on his own knowledge, and also on facts supplied to him by others. It is not essential that he actually examine the subject matter of a lawsuit."

In every significant respect, Passaic Valley's experts qualify under our rules. There has been no challenge to their trustworthiness, their competency, and their integrity. Their evidence has been uncontradicted and cannot be arbitrarily dismissed.

The value of Passaic Valley's pressure filter plant is only a small part of its damages, and may be compared to the value of the land taken under eminent domain proceedings. But, this value of land does not take into account the total amount of the loss sustained by Passaic Valley, unless suitable provision is made to include also the value of the severance damage which follows, by reason of the initial taking.

If the Court had determined only that Passaic Valley's pressure filter plant had to be wiped out, and if the Court had stopped there, the value of the wiped-out plant would have been the only element of damage. But the Court did not stop there. The Court held on the earlier Motion for Summary Judgment that Passaic Valley was locked in with the other partners and, notwithstanding strenuous objections, ordered Passaic Valley into that project.

As a concomitant of its earlier disposition of the Motion for Summary Judgment, in directing Passaic Valley to join the other partners in the Wanaque filter project, the

mandate of the Court itself became the legal justification for the second element of damages as testified to by Passaic Valley's experts. To take away its present plant, and to order it into a new plant would constitute the taking of property without just compensation, unless Passaic Valley receives payment for both elements of its damage.

If the Court did not order Passaic Valley to join with the other partners at Wanaque, that would be one thing. But, if the Court does order Passaic Valley into the proposed project, the true and full measure of damages must necessarily include the value of Passaic Valley's present plant and the capitalized value of the additional expense it will sustain by reason of the Court's basic conclusion.

Because of the unique circumstances in our case, where the North Jersey District, in effect, condemns Passaic Valley's pressure filter plant, and then goes a step further and commands Passaic Valley to join in the proposed Wanaque project, there is an apparent absence of decisional law on the subject of the computation of damages. However, there are analogous and apposite decisions which are informative and which support Passaic Valley's position.

Passaic v. *Gera Mills*, 55 N. J. Super. 73 (App. Div. 1959) and its companion case of *Passaic* v. *Passaic Pioneer Properties Co.*, 55 N. J. Super. 84 (App. Div. 1959) are in this category.

In the *Gera Mills* case, supra (55 N. J. Super. at page 86), the Court said that ". . . although the reconstruction cost formula may be more reliable in valuing newly constructed buildings, the comparable sales or income capitalization approach might be preferred in the case of old and outmoded buildings."

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In the cited case, the property had in past years been used for a textile processing and manufacturing plant. That operation had been completely abandoned and soon after the first assessing date, the entire premises had become a "tenant mill" requiring certain renovations and alterations to accommodate the needs of the new tenants.

Value experts for the taxpayer and for the city both used the same basic formula—reproduction cost less physical depreciation and obsolescence—but the city considered only conventional but not economic obsolescence. The taxpayer's expert gave appropriate consideration to the characteristics of the property while the city did not.

The Court noted that the rationale of the city's expert revealed that he was interested only in what he called "sound value" and did not consider it part of his job to investigate market value.

The Court further noted that ". . . even if we equate his "sound value" to "market value" it does not have the probative force that is contended for by counsel for the city, and this is for the following reasons, among others: (1) The validity of the figures used in the computation was not proved; (2) the city's expert could not testify to the component costs and unit costs which he used; (3) where the plant was made up of several buildings or part of buildings, the city's expert was unable to testify to the physical deterioration of the different parts, but used "an average depreciation."

The Appellate Division concluded that ". . . the weight to be accorded expert testimony is a matter left to the reasonable judgment of the Division of Tax Appeals [the fact finder], and that judgment when supported by substantial evidence will not be disturbed absent the showing of palpable error."

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The Court also considered the weight to be given to the statements of expert witnesses and stated that in the first instance its determination rests with the hearing tribunal, and that the weight to be accorded depends upon the expert's candor, intelligence, knowledge, experience, and especially on the facts and reasoning which are the foundation of the expert's opinions.

In the *Passaic Pioneer* case, supra (55 N. J. Super. at page 98) the Court referred to the method employed by the taxpayer's expert in determining fair value of the property on the basis of capitalized income.

The taxpayer's expert (55 N. J. Super. at page 99) testified as to income other than from rental and fully described the conditions relating to available space, rental, and steam sales income, expenses, the capitalization percentage used, and its justification.

The Court noted that after taking into account all factors, he then stated his considered opinion as to true value. A second expert produced by the taxpayer testified that the capitalization of income approach which he had used was the one that would properly reflect a value which would be reasonable for a willing buyer and a willing seller to agree upon in the circumstances present. (55 App. Div. at page 100).

The Appellate Division recognized ". . . that the true value of any property cannot be found with absolute mathematical certainty. The Panel and the Division [fact finders] must rely upon appraisals resulting from such techniques used by experts which are best suited to determine the true value . . ."

The lower tribunal had concluded that ". . . after an analysis of the evidence submitted, the Panel is of the

opinion that, in its effort to determine the true value of the subject property, either the economic approach (capitalization of income) or the comparable sales approach to value is best suited to give a true picture of the true value of the subject property and are to be preferred over the reproduction cost approach . . ."

The Appellate Division noted (55 N. J. Super. at page 101) that the taxpayer was not precluded from proving fair value by the use of the capitalization of income method, and invoked the same rationale as in the *Gera Mills* case, sustaining the taxpayer's contentions as to value.

In our case, any valuation method which stopped after determining the damage related solely to wiping out Passaic Valley's present pressure filter plant, would be inherently incapable of presenting the full measure of the pecuniary damages which Passaic Valley would sustain.

Mr. Abplanalp, the only expert offered by the plaintiffs, acknowledged this to be so, and indicated that the capitalization of expenses and other economic conclusions would also have to be considered and determined in order to total up Passaic Valley's damage. These components have been fully detailed by the experts who testified for Passaic Valley.

Mr. Inhoffer justified damages of	$6,108,900.
Dr. Maher justified damages of	$6,006,900.
Dr. Lynch justified damages of	$4,812,500.

These estimates of damage represent three separate expert valuations of the damage factor which Mr. Abplanalp, plaintiffs' witness, testified would have to be added to the bricks and steel value of Passaic Valley's present plant.

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A review of these expert valuations indicates that in their most conservative expression, Passaic Valley would sustain damage in excess of $4.8 million to participate in the proposed Wanaque water treatment plant on the same basis that it has participated in the Wanaque supply system in the past.

It has been shown that the construction of the Wanaque treatment plant and the participation by Passaic Valley could result in a saving of $14.7 million to the other partners, expressed on a present worth basis as compared to the alternate of building a plant at Little Falls for the exclusive use of the other partners. This potential saving to the other partners translates to a uniform annual saving over a forty year period at 5% interest, of $857,500.

As Dr. Lynch said,

> "It does not seem unreasonable . . . for the other partners to pay Passaic Valley $280,500. a year out of the even larger saving that they will experience by having Passaic Valley as a partner in the new plant at Wanaque." (May 1, 1972 Report, Exhibit DP-5, page 10)

We believe that on the totality of the evidence, and the unrefuted testimony of the witnesses, Passaic Valley Water Commission is entitled to receive not less than $4.8 million if the Court orders it to abandon its existing pressure filter plant and join with the other partners in the proposed Wanaque plant.

Respectfully submitted,

NEWTON M. ROEMER
Attorney for Defendant, Passiac Valley Water Commission

mc: Stephen L. Gordon, Esq.
Albert S. Gross, Esq.
Roger A. Lowenstein, Esq.

Appendix F

PASSAIC VALLEY WATER COMMISSION
LAW DEPARTMENT
1525 Main Avenue
Clifton, New Jersey 07015

(201) 772-3900

May 16, 1972

NEWTON M. ROEMER
Counsel & General Attorney

Honorable Theodore W. Trautwein
Room 302
Court House
Hackensack, New Jersey 07601

Dear Judge Trautwein:

RE: State of New Jersey ex rel. Department of Health v. North Jersey District Water Supply Commission v. Passaic Valley Water Commission et als
Docket No. C-2710-67

I would like to supplement my letter Memorandum of May 15, 1972, by reference to the recently reported case of *State* v. *Mehlman*, 118 N. J. Super. 587 (App. Div. 1972).

This was a highway condemnation case in which the principal issue was whether the approach used by the owner's real estate expert in arriving at fair market value was proper.

The State had taken part of a vacant tract and the owner's expert had projected a hypothetical building on the land and had capitalized hypothetical income anti-

pated to be derived from the building, without considering a multitude of unknown variables which might be involved in the erection, leasing, operation, and financing of the project.

The entire property involved consisted of less than an acre, on which a one-story commercial building was erected which was used by the owner as a furniture store. The balance of the tract was vacant. Before condemnation, the owner had decided to erect an attached addition to his building and had hired an engineer to prepare plans for it, had obtained a building permit, and had commenced excavation. Part of the excavated ground was included in the parcel taken by the State.

Shortly after, the owner was notified by the State of this intended condemnation and the owner stopped work. At that point, he had spent $750. for a building permit; $2,150. for engineering; and $625. for excavation. Condemnation proceedings were commenced approximately 5 months later.

Aside from a minor disagreement as to the allowance of interest on the award, the principal issue before the Appellate Division was whether the trial court erred in permitting the owner's real estate expert to express an opinion as to market value based upon this hypothetical projections.

In considering this issue, the Appellate Division started with the premise that the owner was entitled to 'just compensation' and reiterated the fair market value standard as the measure of compensation.

It is to be noted that basic to such value is the concept of a *voluntary* agreement between a willing owner and a willing buyer. *Trenton* v. *Lenzner*, 16 N. J. 465, 476

(1954) cert. den. 348 U. S. 972, 75; S. Ct. 534, 99 L. Ed. 757 (1955).

It hardly needs to be reiterated that in our case, Passaic Valley is totally *unwilling* to sell and is, in fact, being coerced and compelled to do so in order to accommodate the economic interests of the other partners, not to mention the challenged motivations of the State agencies involved.

The Appellate Division recognized the difficulty in determining the proper appraisal approach to reach the 'fair market value' figure and stated that ". . . each partial taking case must be decided on its own merits." (118 N. J. Super. at page 591).

It noted that most often real estate experts use the comparable sales approach and that, where the facts warrant it, other approaches are utilized. The Appellate Division held that the test is whether the method used is reasonable under existing circumstances, and relied upon the Supreme Court's language in *Jersey City Development Agency* v. *Kugler*, 58 N. J. 374 (1971):

> There is no precise and inflexible rule for the assessment of just compensation. The Constitution does not contain any fixed standard of fairness by which it must be measured. Courts have been careful not to reduce the concept to a formula. The effort has been to find *working rules* and *practical standards* that will *accomplish substantial justice*, such as, but not limited to, market value. (at 384-385). (Emphasis supplied).

The criticism of the hypothetical approach was not addressed to its 'hypothetical' quality, but rather to the fact

that the conclusions were based on pure speculation, as shown by the fact that the expert was not able to justify and validate the components of his formula, and was unable to present important details of his subsidiary calculations to warrant his ultimate projection of value.

In our case, just the opposite is true—Mr. Inhoffer, Dr. Maher, and Dr. Lynch each presented full and comprehensive explanations for all of the elements which they used in developing their valuations. Even after the most rigorous cross-exmination, their conclusions were unimpeached.

The various elements which they used in their calculations had all been previously warranted by North Jersey's own expert, Mr. Abplanalp, who established the parameters for the projection of total damage, so that, unlike *Mehlman*, supra, Passaic Valley's experts did not project a speculative result but rather tendered a sound and scientific rationale for the fact finder's consideration.

In our case, where Passaic Valley is being mandated to abandon its existing facilities and participate, against its will, in a new and costly project, it seems fair to paraphrase the language of *Kugler*, supra (58 N. J. at 384), that just compensation includes not only the value of Passaic Valley's existing pressure treatment facilities, whose destruction would be made necessary by the State agency's action, but also includes the additional value of the pecuniary damage which Passaic Valley will incur as a consequence of being forced into a much more costly project than would be necessary if it were to remain in its own plant, improved as described by the experts.

Unlike *Mehlman* and other similar cases, where the expert testimony was thin and without probative value, our case contains reports and testimony fully supporting

the stated values. If this were a condemnation case, a jury could not readily discount the testimony of Passaic Valley's experts. [Cf. *Port of New York Authority* v. *Howell*, 59 N. J. Super. 343, 347, 348, (L. Div. 1960), affirmed 68 N. J. Super. 59 (App. Div. 1961).]

There has been substantial and reliable testimony in our case exposing the economic unsoundness of North Jersey's proposal, and as Dr. Lynch has demonstrated, Passaic Valley will sustain pecuniary damages in at least the amount of $4.8 million.

The fact that these expert opinions were presented by three separate individuals (passing for the moment the added factor that the initial introduction of the capitalization approach was made by North Jersey's expert, Mr. Abplanalp), each developing his conclusion through his own discipline, adds even greater weight to the ultimate result. In condemnation cases, it has often been stated that the most satisfactory proof of value is comparable sales: "here is where 'money talks.'" 4 *Nichols On Eminent Domain* (Rev. 3d Ed. 1962), §12.311[3], p. 93.

In our case, the most satisfactory proof of value is what it will cost Passaic Valley to participate in the proposed Wanaque water treatment plant on the same basis that it has participated in the Wanaque Supply System in the past. This sum of money represents the total present worth of the cost of abandoning its own system in favor of the Wanaque plant for an extended period, assumed to be 100 years. Mr. Inhoffer has stated this value to be $6,108,900.; Dr. Maher has stated it to be $6,006,900.; and Dr. Lynch has stated it to be $4,812,500.

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What *Nichols* said about the utilization of comparable sales in condemnation cases, is equally applicable in our case: "here is where 'money talks.'"

Respectfully submitted,

Newton M. Roemer
Attorney for Defendant,
Passaic Valley Water Commission

mc: Stephen L. Gordon, Esq.
Albert S. Gross, Esq.
Roger A. Lowenstein, Esq.

Appendix F

PASSAIC VALLEY WATER COMMISSION
LAW DEPARTMENT
1525 MAIN AVENUE
CLIFTON, NEW JERSEY 07015
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NEWTON M. ROEMER
Counsel & General Attorney

June 1, 1972

Honorable Theodore W. Trautwein
Room 302
Court House
Hackensack, New Jersey 07601

Dear Judge Trautwein:

Re: State of New Jersey ex rel. Department of Health v. North Jersey District Water Supply Commission v. Passaic Valley Water Commission et als
Docket No. C-2710-67

Lest silence be misconstrued as agreement, I should like to make the following comments on the correspondence recently directed to you by Counsel for North Jersey District Water Supply Commission.

We believe that although In re *Plainfield-Union Water Co.*, 57 N. J. Super. 158, 176 (App. Div. 1959) [cited at page 6 of our May 15th letter memorandum], was a rate case, it nevertheless is authority for the statement made that "It expresses Passaic Valley's pecuniary damages in classical investment terms which have been the '. . . dominant yardstick in New Jersey.'"

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As to Counsel's May 19th letter, we believe that the naked comment "that it was a rate case" is a distinction without a difference, which in no manner affects its apposition.

In the final paragraph, Counsel requests judgment *inter alia*, implementing its claimed right to issue revenue bonds to finance construction. We respectfully submit that this issue was not framed in the pretrial order, nor was it raised at the trial.

As to Counsel's May 24th letter, in which reference is made to *State* v. *Mehlman*, 118 N. J. Super. 587 (App. Div. 1972) [cited at page one of our May 16th letter memorandum], we are pleased to be informed that North Jersey adopts the holding which makes it clear that the income capitalization approach is completely acceptable, provided it is bottomed upon facts and not 'pure speculation' as was done there.

Unlike *Mehlman*, in our case, the income capitalization approach was developed in accordance with long approved criteria resting on dependable data expertly and scientifically reinforced. Nowhere is the valuation testimony adduced by Passaic Valley competently challenged, much less rebutted. The fact is that Glen H. Abplanalp, called as a witness by North Jersey, supported Passaic Valley's contentions.

Respectfully yours,

Newton M. Roemer
Attorney for Defendant,
Passaic Valley Water Commission

mc: Stephen L. Gordon, Esq.
Albert S. Gross, Esq.
Roger A. Lowenstein, Esq.

Appendix F

PASSAIC VALLEY WATER COMMISSION
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1525 MAIN AVENUE
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NEWTON M. ROEMER
Counsel & General Attorney

August 7, 1972

Honorable Theodore W. Trautwein
702 Dakota Trail
Franklin Lakes, New Jersey

Dear Judge Trautwein:

Re: State of New Jersey ex rel. Department of Health v. North Jersey District Water Supply Commission v. Passaic Valley Water Commissison et als
Docket No. C-2710-67

The following objections are made to the form of the judgment submitted by Mr. Gross:

On page 2 eight lines from the bottom, should delete "method of payment therefor, computation of the respective contributions of the said constitutent (sic) municipalities", for the reason that in your oral opinion page 6.19, line 16, you acknowledged that this issue was not framed in the pre-trial order. It occurs to me that in view of the substantial capital expenditure involved and the fact that in all the history of North Jersey, financing has been on a voluntary basis assumed by the Partners and not by North Jersey bonds, that the inclusion of the means of financing should not be undertaken on such a casual basis, almost as an afterthought, as expressed in Mr. Gross' June 13 letter to you.

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On page 3, paragraph B should be changed to conform with your oral determination which will be found on page 6.18, line 12, which places the cost of construction on the Partners in proportion to the amount of water contracted to be taken.

Page 3, paragraph C refers to the provisions of NJS 59:5-32 et seq should read NJS 58:5-22 rather than -32. We object entirely to the form of order which authorizes and directs North Jersey to issue and market its bonds, if for no other reason than because it precludes an orderly contractual financing program which could very well make bonding by North Jersey entirely unnecessary.

We also object to page 3, paragraph D. We contend that payment in any amount which may be made to Passaic Valley Water Commission should be made by all the Partners excepting Passaic Valley and not by North Jersey.

As presently framed, paragraph D would enable North Jersey to pay Passaic Valley with 62¼-cents dollars by reason of the fact that Passaic Valley would be contributing 37-¾ cents, being its percentage of ownership.

We contend at this time, that any judgment should be limited solely to the issues framed by the Appellate Division (109 N. J. Super. 166) (App. Div. 1970) which were as stated on page 6.3 of your Honor's oral opinion.

It is our position that considerations of judicial economy should not be permitted to overwhelm considerations of operating reality.

Respectfully yours,

NEWTON M. ROEMER
Counsel

NMR:grt

mo:

Stephen L. Gordon, Esq.
Albert S. Gross, Esq.
Roger A. Lowenstein, Esq.

APPENDIX G

Answer of Passaic Valley Water Commission and Constituent Municipalities to Complaint of State Department of Health and Answer to Third Party Complaint of North Jersey District Water Supply Commission

(Filed—August 5, 1968.)

SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION—PASSAIC COUNTY

DOCKET NO. C 2710-67

STATE OF NEW JERSEY ex rel.
DEPARTMENT OF HEALTH

Plaintiff

v.

NORTH JERSEY DISTRICT WATER
SUPPLY COMMISSION

Defendant-Third Party Plaintiff

v.

CITY OF NEWARK, TOWN OF KEARNY
BOROUGH OF GLEN RIDGE, TOWN OF
MONTCLAIR, TOWN OF BLOOMFIELD,
et als.

Third Party Defendants

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Third party defendants, City of Passaic, City Hall, Passaic, New Jersey; City of Paterson, City Hall, Paterson, New Jersey; City of Clifton, City Hall, Clifton, New Jersey; and Passaic Valley Water Commission, a public body of the State of New Jersey, having its office at 1525 Main Avenue in the City of Clifton, County of Passaic, and State of New Jersey, answering the Complaint of State of New Jersey, ex rel. Department of Health, and the Third Party Complaint of North Jersey District Water Supply Commission, say:

As to the Complaint of State of New Jersey Ex Rel. Department of Health

1. They admit the allegations of Paragraph No. 1.

2. They admit that North Jersey District Water Supply Commission (North Jersey) owns, operates, and maintains a water treatment plant located as alleged, but state that such ownership, operation, and maintenance is in trust for each of the contracting municipalities in accordance with the provisions of N.J.S.A. 58:5-1 et seq., and in particular N.J.S.A. 58:5-24. They further state that the North Jersey does not "distribute" water for public potable, and culinary purposes, but "transmits" such water for distribution by other waterworks systems, of which the Cities of Passaic, Paterson, and Clifton, represented by Passaic Valley Water Commission (Passaic Valley), is one.

3. They admit the allegations of Paragraph No. 3 except they deny that North Jersey distributes the water and they deny that North Jersey serves the City of Jersey City with water.

4. They deny that North Jersey distributes water and state that they have no knowledge or information sufficient to form a belief as to the remaining allegations of Paragraph No. 4 and leave plaintiff to its proof.

5. They have no knowledge or information sufficient to form a belief as to the allegations of Paragraph No. 5 and leave plaintiff to its proof.

6. They admit that the Department of Health made an Order on January 24, 1966, but state that no prior hearing was held and that these defendants were not afforded due process of law in the formulation of such Order, and they deny that the Order was within the scope of the statute and the applicable statutory powers of the Department.

7. They admit that the Order was entered and state that the time for its performance was extended and that otherwise the Order speaks for itself.

8. They admit that the Order was entered and that otherwise the Order speaks for itself.

9. They admit that the Order was entered and that otherwise the Order speaks for itself.

10. They deny the allegations of Paragraph No. 10 and state that North Jersey has engaged Havens and Emerson, a firm of engineering consultants, which has studied and reported on the project. They further state that North Jersey is the trustee for the contracting municipalities and it does not have the authority to construct the project because: (a) the enabling statute does not au-

thorize such work; (b) some of the contracting municipalities already have facilities for accomplishing the alleged purpose to be achieved by the Order in question; (c) some contracting municipalities are now in the course of independently providing for similar facilities; and (d) the basic findings and determinations were not developed in accordance with law.

11. They deny the allegations of Paragraph No. 11.

12. They deny that there has been violation of N.J.S.A. 58:11-4 and therefore that the Order in question has no legal basis or efficacy.

13. They deny that the Department of Health is entitled to any relief.

SEPARATE DEFENSES

1. The Department of Health knows that North Jersey is the statutory trustee for the municipal owners represented by Passaic Valley. Notwithstanding such knowledge, it has never served notice on said owners or upon Passaic Valley, nor has it conducted a hearing so that they could be heard and afforded an opportunity to inquire into the basic need and justification, if any. The municipal owners and Passaic Valley have never been afforded an opportunity to determine objectively whether there was need and justification for the making of the Order made by the Department of Health on January 24, 1966. Such Order was not made in accordance with the statutory provisions governing the Department of Health and the interested parties were not afforded their rights in accordance with due process of law.

Appendix G

2. The Department of Health knows that Passaic, Paterson, and Clifton, represented by Passaic Valley, have for many years had and now have filtration facilities independent of any facilities of North Jersey, and that it is economically and technically unnecessary and unjustified for the 3 cities, represented by Passaic Valley, to undertake the construction of a new facility, either independently or with others.

3. On information and belief, it is alleged that the Department of Health knows that the City of Newark and other defendants are now in process of preparing to construct or to have constructed filtration facilities which will accomplish the same purposes allegedly to be accomplished by the Order in question.

4. The Order of January 24, 1966, is arbitrary, unreasonable, and capricious, and is not based on law, and was not formulated in accordance with applicable principles of due process.

5. The 3 cities of Passaic, Paterson, and Clifton, own a 37.75% interest in the Wanaque-Ramapo Projects, operated by North Jersey as their trustee. This represents an obligation of approximately $4.5 million as their share of the stated capital cost of the proposed filtration plant. In addition, these cities would be burdened with ongoing charges for 37.75% of the operating expenses and debt service for such plant. These 3 cities, through Passaic Valley, have for a long time, and at the present time are operating a filtration plant at Little Falls which delivers filtered water that meets all legal standards. By reason of the existence and expense of these facilities, the 3 cities and Passaic Valley have no need for the type of facility

now proposed to be constructed by North Jersey. Even if it were to be assumed that statutory justification could be shown for the construction of any filtration facility, these defendants state that they already have adequate facilities available and in operation.

6. The effect of the January 24, 1966, Order is to confiscate the existing filtration facilities of these defendants, and constitutes a taking of property without just compensation and is contrary to law.

As to Third Party Complaint of North Jersey District Water Supply Commission

1. They admit the allegations of Paragraph No. 1.

2. They admit the allegations of Paragraph No. 2.

3. They admit the allegations of Paragraph No. 3.

4. They admit that North Jersey is Trustee for their benefit, pursuant to the provisions of N.J.S.A. 58:5-1 et seq.

5. They admit that they provided certain funds and state that North Jersey is trustee for their benefit in accordance with N.J.S.A. 58:5-1 et seq.

6. They admit so much of the allegations of Paragraph No. 6 as relate to the purity of the water and to compliance with lawful orders.

7. They admit that the Department of Health issued an order on January 24, 1966, which speaks for itself, but

they neither admit nor deny any of the contents of such Order and leave the third-party plaintiff to its proof.

8. They have no knowledge or information sufficient to form a belief as to the allegations of Paragraph No. 8 and leave the third-party plaintiff to its proof.

9. They deny the allegations of Paragraph No. 9 insofar as they state that they were supplied with certain reports on September 27, 1957 (*sic*) and December 29, 1967. They have no knowledge or information sufficient to form a belief as to the remaining allegations of Paragraph No. 9 and leave the third-party plaintiff to its proof.

10. They admit the allegations of Paragraph No. 10.

11. They have no knowledge or information sufficient to form a belief as to the allegations of Paragraph No. 11 and leave the third-party plaintiff to its proof.

12. They have no knowledge or information sufficient to form a belief as to the allegations of Paragraph No. 12 and leave the third-party plaintiff to its proof.

13. They have no knowledge or information sufficient to form a belief as to the allegations of Paragraph No. 13 and leave the third-party plaintiff to its proof. They also dispute the justification for the Order in question.

14. They have no knowledge or information sufficient to form a belief as to the allegations of Paragraph No. 14 and leave the third-party plaintiff to its proof.

15. They incorporate their Answer to the Complaint as part of their Answer to the third-party Complaint as if set forth herein in full.

16. They deny that third-party plaintiff is entitled to any relief.

Third Party Defendants demand trial by jury of the issues set forth in the Complaint.

Dated: July 29, 1968

/s/ CHARLES E. MILLER,
City Counsel
Attorney for Defendant, City of Passaic
663 Main Avenue
Passaic, New Jersey

/s/ JOSEPH L. CONN,
City Counsel
Attorney for Defendant, City of Paterson
City Hall
Paterson, New Jersey

/s/ ARTHUR J. SULLIVAN, JR.,
City Counsel
Attorney for Defendant, City of Clifton
City Hall
Clifton, New Jersey
By FRANK A. CARLET,
First Legal Assistant

Appendix G

/s/ NEWTON M. ROEMER,
Counsel
Attorney for Defendant, Passaic
Valley Water Commission
1525 Main Avenue
Clifton, New Jersey

SUPREME COURT, U. S.
IN THE
Supreme Court, U. S.
FILED
OCT 18 1974
MICHAEL RODAK, JR., CLERK

Supreme Court of the United States

October Term, 1974

No. 74-306

PASSAIC VALLEY WATER COMMISSION, a public body of the State of New Jersey, for itself and on behalf of the CITIES OF PATERSON, PASSAIC, AND CLIFTON in the State of New Jersey,

Petitioner,

vs.

STATE OF NEW JERSEY, *Ex Rel* DEPARTMENT OF HEALTH, NORTH JERSEY DISTRICT WATER SUPPLY COMMISSION and CITY OF NEWARK in the State of New Jersey,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPERIORCOURT OF NEW JERSEY, APPELLATE DIVISION

TELTSER & PERLE
Attorneys for Respondent,
North Jersey District
Water Supply Commission
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MICHAEL R. PERLE
On the Brief

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October Term, 1974

No.

PASSAIC VALLEY WATER COMMISSION, a public body of the State of New Jersey, for itself and on behalf of the CITIES OF PATERSON, PASSAIC, AND CLIFTON in the State of New Jersey,

Petitioner,

vs.

STATE OF NEW JERSEY, *Ex Rel* DEPARTMENT OF HEALTH, NORTH JERSEY DISTRICT WATER SUPPLY COMMISSION and CITY OF NEWARK in the State of New Jersey,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPERIORCOURT OF NEW JERSEY, APPELLATE DIVISION

Respondent, North Jersey District Water Supply Commission ("North Jersey"), a public agency of the State of New Jersey, respectfully prays that the petition for a Writ of *Certiorari* of petitioner, Passaic Valley Water Commission, be denied.

COUNTERSTATEMENT OF JURISDICTION

This matter is concerned exclusively with issues of a political and policy nature, only implicating the laws of the State of New Jersey and only of concern to the citizens of that State. In contention are State statutes and their proper interpretation under State law. No substantial federal questions are raised by the Petition. Therefore, the jurisdiction of this Court under 28 U.S.C. §1257(3) is not properly invoked.

COUNTERSTATEMENT OF QUESTIONS PRESENTED

The only questions which have been before the courts in this matter are those questions set forth in the opinion of Appellate Division, Superior Court of New Jersey. (See "Appendix A," p. 4a)

COUNTERSTATEMENT OF THE CASE

The reasonableness and feasibility of the Wanaque Plan judged only from the standpoint of its cost and utility to member-municipalities is beyond dispute and no substantial public question relating thereto is raised by the petition

The Petition for Certiorari now before this Court is frivolous. It raises no substantial federal questions. Moreover, one can hardly overlook the fact that it is the delay attending petitioner's prosecution of this litigation, by raising the cost of the project from $11.6 million to $22 million due to inflation, rather than the persuasiveness of petitioner arguments which bodes as more likely to prevent the consummation of the Wanaque project.

Stripped of hyperbole, petitioner's argument in this litigation has been that the Wanaque plan is unjustifiable and unreasonable in comparison with the multiple filtration plant scheme it suggests, when viewed solely on the basis of the interests the member municipalities of respondent, North Jersey District Water Supply Commission ("North Jersey"), and only become reasonable when statewide interests are factored in. Even a cursory review of the largely uncontroverted evidence developed before the trial court will demonstrate conclusively that a comparison of the benefits accruing solely to the membership of North Jersey as a *whole* under Wanaque plan, versus the benefits of an upgrading Passaic Valley's plant and construction of a new plant at Little Falls, overwhelmingly favors the Wanaque plan.

From a strict dollars and cents standpoint, filtered water from Wanaque would cost all of the members of North Jersey $39 per million gallons, whereas, if a filtration plant were to be built at Little Falls, excluding the Passaic Valley municipalities, the cost to other members of North Jersey would be $72 per million gallons. Indeed, the annual cost of operating the 100 mgd Wanaque plant for all of the members of North Jersey would be $1,423,500 while it would cost up to $2,179,073 to operate the 67 mgd Little Falls plant for only the non-Passaic Valley members of North Jersey (1T323-3 to 12). At the same time, assuming that pre-treatment would be required in addition to an overall upgrading of Passaic Valley's plant, the annual cost to it of participating in the Wanaque plan would be equal to, or even less than "going it alone" (1T323-8 to 12). In other words, it would cost everybody

else twice as much were Passaic Valley allowed to abort the Wanaque plan, while it would cost Passaic Valley little or nothing more to participate in the Wanaque plan.

On the other hand, if the plant were to be built at Wanaque, North Jersey could sell its filtered surplus to non-member towns adjacent to its aqueduct and thereby reduce the cost of water to its membership as a whole. On the other hand, the really motivation for petitioner in bringing this litigation has been that if North Jersey's plant were built at Little Falls, only petitioner would have filtered water to offer these towns, and Passaic, Clifton and Paterson alone of the members of North Jersey, would profit from sales to non-members along the aqueduct. In other words, petitioner wants a monopoly. When the possibility that non-members of North Jersey will use Wanaque water, as they do now, whether filtered at Wanaque or filtered at Passaic Valley's plant is considered, it again becomes plain that in terms of interests of the ownership of North Jersey as a whole, the Wanaque plant is infinitely preferable.

The Wanaque plan also offers intangible advantages to the whole membership of North Jersey which cannot be otherwise duplicated. A Wanaque filtration plant would make possible augmentation of the North Jersey water supply with filtered water from Pequannock and Jersey City in the event of drought. (IT229-1 to 230-13). A Wanaque plant would offer increased output per man-hour and decreased energy consumption (a factor which has assumed greater importance since the trial), due to the maximized "head" available at the reservoir. (IT167-12 to 168-21).

On the basis of the foregoing, it is clear beyond cavil that the advantages and merits of Wanaque plan, viewed only from the standpoint of all of the owners of North Jersey, far outstrip those of any alternative proposal. Therefore, it is respectfully suggested that certainly no substantial federal question exists regarding the reasonableness or feasibility of the Wanaque filtration plant plan as would require review by this Court.

The basic argument petitioner has offered is that North Jersey was chartered as, and must act only as the exclusive servant of its owner municipalities; and further, that in formulating any plan, North Jersey is bound to act only upon the basis of, and in strict deference to the narrow interests of its owners alone to the exclusion, or in disregard of, the interests of other municipalities, or the State as a whole. Petitioner has contended that the plan

approved below would force the Passaic Valley municipalities and the other owners of North Jersey to subsidize intended or inevitable benefits conducing only to municipalities other than the owners of North Jersey. In this Court petitioner has attempted to give these arguments some constitutional coloration.

In effect, petitioner has argued only that the State and North Jersey have exceeded their state statutory limitations and penalized local municipalities in an arbitrary manner. The point petitioner has tried to make is that it is being asked to subsidize benefits for non-owner municipalities whose interests North Jersey has no right to consider in formulating its filtration plant plan. Following this logic, "economic unfeasibility" and "financial disaster" are equated with "an excessive or unreasonable cost," which apparently means any difference in the cost per gallon to Passaic Valley due to upgrading the system as proposed by North Jersey and the supposed cost per gallon to Passaic Valley of upgrading its old plant, assuming that this could be done.

In essence, petitioner now would argue that because of a possible savings to Passaic Valley from "going it alone," petitioner has a constitutional right to attempt to upgrade its existing plant for its exclusive use in the hope of duplicating the performance offered by the Wanaque plant for all members of North Jersey: it being of no consequence that petitioner's refusal to participate in the Wanaque plan would disserve State water policy and force North Jersey to build the plant at Little Falls at double the operating cost to the remaining members of North Jersey. See (1T30-3 to 15; 30-20 *et. seq.*)

Both statute and case law place beyond argument the fact that *North Jersey is not the exclusive servant of its owners.* Its stewardship runs to the water needs of the entire North Jersey water supply district. Further, a reading of *City of Bayonne vs. N.J.D.W.S. Comm.*, 30 *N.J. Super* 409 (App. Div. 1954) in tandem with *N.J.S.A.* 58:5-1 *et. seq.*, will dispell any concern that the members of North Jersey are to underwrite the implementation of benefits designed to conduce only to municipalities now outside the North Jersey compact.

North Jersey's "statutory and fiduciary" obligations extend not only to its owner municipalities, but also to all those other municipalities which may be entitled to share in its water supply: namely, any other municipality in the North Jersey water supply district. See *N.J.S.A.* 58:5-9 to 15.

A necessary corollary to the statutory protection of the

rights of non-owners, and the statutorily mandated public trusteeship North Jersey holds for them, must be a factoring of their needs and interests into the formulation of any plans to expand, acquire, construct or improve North Jersey's water supply system. See *N.J.S.A.* 58:5-12. Even more clearly, North Jersey's plans cannot be divorced from, but in fact must implement or at least be in harmony with "statewide water policy."

An examination of the statutory provisions which established North Jersey, *N.J.S.A.* 58:5-1, *et. seq.*, reveals the notion the Petition conjures up of North Jersey's owners underwriting the costs of projects which will only be of benefit to others is chimerical.

N.J.S.A. 58:5-23 provides that:

> "After the actual completion of the plant and the commencement of the actual supply of water from there, the expenses of the commission...shall be charged to operation and properly proportioned as between the several water supply projects which may be operated by the commission.
>
> ...In apportioning said cost [of the plant], no municipality shall be charged with any item of interest or rental upon, or cost of operation of, any part of any water plant which is not used in supplying water to municipality."

In other words, Petitioner, by statute is guaranteed that it will not be made to bear the cost of financing, rental, or operation "of any part of any water plant" which is not used to supply water to its members, although North Jersey, by statute may be bound to provide such part for non-owners. To the extent they are the beneficiaries of such parts of a plant, new or non-owners must bear the costs relating thereto.

As far as the costs of operation, any incremental costs incurred as a result of water being made available to new owners or non-members of North Jersey would be borne by those municipalities. More likely, the inclusion of non-members (or new owners) would serve to reduce the costs of North Jersey water to present-member municipalities, with the savings returned to them.

Thus, at worst, petitioner would bear only its fair share of the costs of operating any facilities used for supplying it with water. More probably, as the statute envisions, Passaic Valley and the

other present owners, in effect, stand to get a greater return for their water-dollar, precisely because the Wanaque plan, unlike the Little Falls plan of Passaic Valley, does have utility in meeting the future needs of all of the municipalities in the North Jersey district. (1T324-7 to 24).

Likewise with respect to costs of construction of the new supply facility, any non-owner municipality to whom the Wanaque plant will make North Jersey water available, must bear an "equitable share" of that cost, including the interest on the entire original cost of the project, not merely on that portion of the bonds which may be outstanding. See *N.J.S.A.* 58:5-26.

Petitioner has conceded that it would have to go along with a filtration plant plan, even if it was not tailored exclusively to its own interests, if the plan were devoted to the sole benefit of the partners in North Jersey. But as developed herein, the statutory scheme is not predicated on the narrow self-interest of the partners, nor are North Jersey's responsibilities so bounded. Petitioner must defer to those responsibilities. The statute, however, guarantees absolutely that in meeting the needs of the district North Jersey was created to serve, the owners of North Jersey will not be made to bear any untoward costs. And indeed, the statutory scheme insures that far from costing the owners of North Jersey money, the possible utility of the Wanaque plant in meeting the needs of other municipalities in the supply district can only inure to the financial benefit of Passaic Valley and the other participants in North Jersey.

CONCLUSION

For the reasons aforestated, third-party plaintiff-respondent, North Jersey District Water Supply Commission submits that the Petition for *certiorari* fails to present a viable federal question or any question of public importance. It is further submitted that the decision of the New Jersey Appellate Division from which review is sought is consonant with decisions in this Court. Therefore, it is respectfully urged that the Petition for Certiorari be denied.

Respectfully submitted,
TELTSER and PERLE

By _____
Michael R. Perle

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-306

PASSAIC VALLEY WATER COMMISSION, *et al.*,

Petitioner,

vs.

STATE OF NEW JERSEY, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the Superior Court of New Jersey, Appellate Division

BRIEF IN OPPOSITION

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On Petition for Writ of Certiorari to the Superior Court of New Jersey, Appellate Division

BRIEF IN OPPOSITION

Counter-Statement of the Question Involved

Is it an appropriate exercise of the State police power to order a public corporation operating a water supply system for eight municipalities which are contractually and statutorily committed to comply with State and federal water supply standards, to meet those standards?

Counter-Statement of the Case

Respondent North Jersey District Water Supply Commission is a public corporation created pursuant to N. J. S. A. 58:5-1 *et seq.* for the purpose of making adequate supplies of potable water available to contracting municipalities.

Eight municipalities contracted with North Jersey in 1918 for the construction and operation of the Wanaque reservoir at Wanaque, New Jersey. Under the contract the eight participating municipalities are to share in the costs and receive water from the Wanaque reservoir in specified proportions. Petitioner Passaic Valley Water Commission, a public corporation created in 1927 pursuant to N. J. S. A. 40:62-108 *et seq.*, serves as agent for three of these municipalities, which together share in 37.-75% of the Wanaque reservoir's water and costs.

The contract between North Jersey and its eight constituent members authorizes North Jersey to maintain, repair and operate the system constructed for its members and to prevent or remove pollution from its water supply, all at the contracting municipalities' expense. North Jersey retains sole ownership and control of the facilities, in trust for the contracting municipalities and such other municipalities as may be entitled to participate. N. J. S. A. 58:5-24.

North Jersey's present system consists essentially of the Wanaque Reservoir and a 21 mile aqueduct running south from the reservoir, connecting with several other major water sources and with its member towns along the way. At present, treatment of the water as it leaves the Wanaque Reservoir is limited to screening, chlorination, ammoniation and lime.

While sharing in 37.75% of North Jersey's Wanaque supply and costs, petitioner also distributes water from the Passaic River to its three member municipalities. Where the Passaic River supply interconnects with the Wanaque reservoir supply, petitioner pretreats river water and filters it in a gravity filtration plant. It also filters Wanaque water through a pressure filtration plant originally installed in 1929 for filtering Passaic River water but subsequently converted to the treatment of Wanaque water. After filtration and treatment, water from both sources is mixed and transmitted to petitioner's customers.

The State has classified the waters flowing into the Wanaque reservoir as class 3 water, requiring pretreatment, filtration, and disinfection for use as a public potable water supply. Water transmitted from the Wanaque headworks has not met State and federal potable water standards since 1965.

On January 24, 1966, the Commissioner of Health issued an order to North Jersey requiring it to bring its Wanaque supply into compliance with State and federal potable water standards by January 1, 1968. Upon receipt of this order, representatives of the partner municipalities retained a consultant who eventually concluded that one particular location at the Wanaque headworks was the most advantageous site for a new water treatment plant because it represented the overall lowest cost per million gallons of water at the capacity involved and because it had certain advantages with respect to Statewide water supply management.

In June 1968 the State Department of Health filed a complaint seeking to compel North Jersey to upgrade its Wanaque water treatment facilities in accordance with the 1966 administrative order. In its answer, North Jer-

sey expressed its willingness to comply with the State's order, and in turn filed a third party complaint against its eight member municipalities requesting a declaratory judgment that it possessed the statutory and contractual authority to construct the facilities at their expense. Several of the municipalities, most notably Passaic, Paterson and Clifton (acting through their agent petitioner Passaic Valley), and the City of Newark, filed answers attacking the validity of the underlying State order and disputing the authority of North Jersey to construct the facilities under existing law and contracts and to issue bonds to finance such construction.

On March 4, 1974 the Appellate Division sustained the State order and regulations. *Newark* v. *Dept. of Health of N. J.*, 109 N. J. Super. 166, 262 A. 2d 718 (App. Div. 1970). Thereafter, cross-motions for partial summary judgment were brought in the trial court by North Jersey, Newark and Passaic Valley, resulting in a determination that the third party defendants were required to contribute to the costs of construction and operation of the proposed new filtration plant. By oral opinion of June 26, 1972 and final judgment entered on September 6, 1972 following a plenary hearing, the trial court held that North Jersey's plan to build at the Wanaque headworks was reasonable, that North Jersey has the authority to issue bonds to finance the plan, and that Passaic Valley was entitled to payment by North Jersey of $650,160 for its pressure filtration facilities.

The Appellate Division affirmed the trial court's decision in its entirety, concluding that the State has the statutory authority to compel petitioner to participate in and help pay for a project to improve the water supply system in which it shares by contract with North Jersey,

that the proposed Wanaque project is the one which will most efficiently and economically meet State standards, and that the costs of this project to petitioner do not represent a taking of property for which compensation is required.

A petition for certification filed by Passaic Valley was denied by the New Jersey Supreme Court on July 22, 1974. The decision of the Appellate Division therefore became final, and North Jersey undertook procedures to implement it. The State Supreme Court subsequently denied petitioner's application for a reconsideration of the denial of its petition for certification, while continuing until September 23, 1974 a temporary stay originally imposed upon North Jersey by a single justice on condition that Passaic Valley perfect its petition for certiorari by that date.

On September 18, 1974 Passaic Valley filed a petition for a writ of certiorari with this Court. On September 19, 1974 petitioner submitted to Justice William J. Brennan, Jr. an application for a stay pending disposition by this Court of its petition. Justice Brennan denied that application on September 24, 1974.

ARGUMENT

A writ of certiorari should be denied because the State's order requiring North Jersey through its members to upgrade the filtration of water in the Wanaque Reservoir was a proper exercise of the State police power and represents no federal constitutional question.

The central issues during the long history of this case have been: (1) whether North Jersey has the statutory authority to proceed to comply with the State's 1966 order at the apportioned expense of its member municipalities; and (2) whether North Jersey has chosen a financially and environmentally reasonable method of complying. These issues have required each level of the New Jersey judicial system to interpret the State statutory scheme under which North Jersey operates, and to consider the reasonableness of the proposed Wanaque project in terms of water supply and potability problems in New Jersey. It is therefore clear that the central issues raised in this case are of State rather than federal significance.

The State has the power to control and conserve the use of its water resources for the benefit of all its inhabitants. *City of Trenton* v. *State of New Jersey*, 262 U. S. 182 (1923). Pursuant to this authority the Legislature has, over the years, enacted various statutes which give to the present Department of Environmental Protection broad regulatory and supervisory authority over the construction and operation of potable water supplies in New Jersey. N.J.S.A. 58:11-1, 2 and 3 provide that no person may distribute or sell water for potable purposes without first obtaining from the Department approval of the source and of detailed plans and specifications for any

water treatment facilities which the Department may require. N.J.S.A. 58:11-4 authorizes the Department to supervise and regulate the purity of all potable water supplies in the State, while N.J.S.A. 58:1-10 and 13 give the Department broad authority to plan for the economical and comprehensive development of all potable and public water sources and all watersheds.

By the adoption of N.J.S.A. 58:5-1 *et seq.*, the Legislature created two water supply districts together encompassing the entire State, and provided the district commissions created thereunder with powers sufficient to develop water supplies for any municipality in the State. Municipalities within a particular water district may contract with the district commission for their water supply (N.J.S.A. 58:5-12 through 14), although that contract is only one element in a general scheme of cooperation among the contracting municipalities. The cost of initial construction or acquisition of the water supply for district members is borne by the contracting municipalities in proportion to the amount of water contracted for, N.J.S.A. 58:5-22, and the cost of operation and maintenance after that time is apportioned in the same manner. N.J.S.A. 58:5-23.

Where municipalities have not chosen to join one of the two State water supply districts, the Legislature has made available another form of cooperative activity by the provisions of N.J.S.A. 40:62-108 *et seq.*, which permit two or more municipalities to come together to form a water commission acting for each or all of them. Paterson, Passaic and Clifton originally adopted such a scheme in forming petitioner Passaic Valley Water Commission. In permitting such local groupings for water supply matters, the Legislature did not in any way relinquish broad

State control over water supply. N.J.S.A. 40:62-131; N.J.S.A. 40:62-134; N.J.S.A. 40:62-146. In the present case petitioner, although formed under N.J.S.A. 40:62-108 *et seq.*, has chosen to avail itself of further regionalization through partnership in the North Jersey Water Supply District. The Legislature has made clear that the provisions of N.J.S.A. 40:62-108 *et seq.* shall in no way affect the provisions of N.J.S.A. 58:5-1 *et seq.*, governing a State water supply district and its members. N.J.S.A. 40:62-150.

It was in the context of this comprehensive statutory scheme, and specifically pursuant to N.J.S.A. 58:11-1 and 4, that the State in 1966 ordered North Jersey to improve its water treatment plant at the Wanaque headworks. No party has disputed the State's determination that further treatment of Wanaque water is necessary, but petitioner argued below that in comparison with other possible alternatives the North Jersey plan has been erroneously found economically feasible.* However, the record fully

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* Throughout the long history of this case, petitioner has argued in conjunction with this challenge to the Wanaque plan's economic feasibility that North Jersey does not have the statutory authority to issue bonds to finance the plan, basing this contention on a particular construction of North Jersey's enabling statutes. The State has consistently concurred with North Jersey in its assertion that it has such authority, an assertion accepted by the New Jersey courts. The issue of North Jersey's bonding authority has been presented before each of these courts as one of exclusively statutory construction. Petitioner now seeks to suggest for the first time before this Court that the issue in one of federal constitutional import. By this subterfuge it seeks this court's review of a construction of a State statute by State courts, as well as this court's original determination of that State statute's com-

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supports the conclusion reached by all levels of the New Jersey court system that the Wanaque plan is the most efficient and feasible of the possible alternatives, both technically and economically, in meeting the State's order to North Jersey to bring its water supply up to State standards.

This conclusion, based on evidence concerned with local and State-wide water supply planning and policy conducted within a comprehensive State statutory scheme, is clearly one to be drawn by the State courts, and presents no question of federal or constitutional import of interest to this Court. The only federal issue put forward by Passaic Valley is that to charge to it the cost of its share of the Wanaque project and to reimburse it for the replacement cost of its filtration plan less depreciation would constitute a taking without compensation.

Initially it must be noted that the State is prohibited by the Fifth and Fourteenth Amendments to the United States Constitution from taking *private* property without compensation. It is clear that a filtration plant owned and operated by a public corporation such as petitioner acting as agent for three municipalities is not private property, and that therefore even if a "taking" could

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pliance with the New Jersey Constitution. U.S. Supreme Court Rule 23(1)f makes clear that where a federal question is not properly and timely raised in a State case, this Court does not have jurisdiction to review the judgment on a writ of certiorari. Even if this were not the rule, it is clear that the State courts' interpretations of North Jersey's statutory authority do not raise a genuine constitutional question, for the reasons set forth *infra* in response to petitioner's allegations of a taking without compensation.

be shown, no compensation would be required. Municipalities cannot as instruments of the State invoke constitutional questions against it. The constitutional guarantees are designed to protect private citizens from State infringements of private rights, not to protect one arm of the State from the State itself. *City of Trenton* v. *State of New Jersey*, *supra*, 262 U. S. at 185-186.

Even assuming private property were involved in this case, it is settled law that a proper exercise of the police power does not give rise to a right to compensation, even though the value of property may consequently be reduced. Specifically, it is unquestionably within the State's police power to control and conserve the use of its water resources for the benefit of all its inhabitants. The State may establish standards for potable water quality and direct distributors of potable water to take steps necessary to achieve compliance with those standards. *City of Trenton* v. *State of New Jersey*, *supra*, 262 U. S. 182. In the present case the New Jersey courts have found the State's order and acceptance of the North Jersey plan to be a proper and reasonable exercise of the State's police power. Thus any "loss" petitioner may suffer as a result of the State order and court judgment will be a direct consequence of a proper exercise of the police power.

It is also well settled that when the State acts pursuant to the police power to provide safe and adequate potable water supplies through improvement of existing facilities or new construction, and its action is reasonable, the consequences to others who are injured because of competition, obsolescence, or because their existing facilities become unnecessary, are not such as to require compensation under the State or federal Constitutions. *Madera Waterworks* v. *Madera*, 228 U. S. 454 (1913). *See also*

Denver v. *New York Trust Co.*, 229 U. S. 123 (1913). In *Madera Waterworks*, plaintiff private water company, acting under municipal regulation, constructed a water plant and laid water pipes. Thereafter the municipality decided to construct its own water facilities pursuant to State statutory authority. Plaintiff argued that the resulting "ruinous competition" by the city would "destroy the plaintiff's property, contrary to the 14th amendment." 228 U. S. at 456. While accepting the premise that the competition was "ruinous" and would destroy plaintiff's property, Justice Holmes found no constitutional infirmity. Since the city was legally authorized to build waterworks, "plaintiff took the risk of what might happen." *Id.*

In the present case the construction of additional treatment facilities by North Jersey to remove and prevent pollution of the water was permitted by statute and authorized by contract. Thus petitioner, in choosing to build its own filtration plant while at the same time sharing in North Jersey's development, assumed the risk that such development might occur in the future, rendering its own plant unnecessary. Petitioner's resulting "loss" is thus clearly not one for which compensation must constitutionally be made.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that Passaic Valley's petition for a writ of certiorari should be denied.

Respectfully submitted,

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